

EXHIBIT 50

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JAMES D. SULLIVAN, et al.,)
Individually and on behalf of)
a Class of persons similarly)
situated,)
 Plaintiffs,)
) CIVIL ACTION NO.
) 5:16-cv-00125
)
)
SAINT-GOBAIN PERFORMANCE)
PLASTICS CORPORATION,)
 Defendant.)

VIDEO-RECORDED DEPOSITION
- of -
DAVID K. MEARS

taken on behalf of the Defendant on Monday,
September 24, 2018, at the offices of Biggam
Fox Skinner LLP, 453 Stone Cutters Way,
Montpelier, Vermont, commencing at 8:58 AM.

VIDEOGRAPHER: MARY DOUD
COURT REPORTER: JOHANNA MASSÉ, RMR, CRR

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

EMILY J. JOSELSON, ESQUIRE

3 Langrock, Sperry & Wool, L.L.P.

111 South Pleasant Street, P. O. Drawer 351

4 Middlebury, Vermont 05753-0351

(802) 388-6356 | ejoselson@langrock.com

5
6
7 ON BEHALF OF THE DEFENDANT:

8 DAVID WEINRAUB, ESQUIRE

Dechert LLP

9 Three Bryant Park

1095 Avenue of the Americas

10 New York, New York 10036-6797

(212) 641-5611 | david.weinraub@dechert.com

I N D E X

DAVID K. MEARS	PAGE
EXAMINATION BY MR. WEINRAUB	7
EXAMINATION BY MS. JOSELSON	175
EXAMINATION BY MR. WEINRAUB	180
EXAMINATION BY MS. JOSELSON	187

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
Exh 1	Expert Rebuttal Report of David K. Mears, J.D.	8
Exh 2	12/15/17 Merits Report of Philip K. Hopke, Ph.D.	26
Exh 3	David Mears's Billing Records as of 8/30/18	28
Exh 4	Vermont Air Pollution Control Regulations through 11/30/16	40
Exh 5	8/1/18 Rebuttal Report of Philip K. Hopke, Ph.D.	55
Exh 6	7/21/92 Federal Register	81
Exh 7	5/24/96 Federal Register Excerpt	82
Exh 8	5/4/18 Report of Felix Flechas, P.E.	87
Exh 9	6/8/90 ChemFab Permit	89
Exh 10	12/9/98 Memo to ChemFab Corporation A2 File from Chris Jones	109

(Continued)

E X H I B I T S

(Continued)

NUMBER	DESCRIPTION	PAGE
Exh 11	October 1972 Statutes and Regulations Concerning Air Pollution Control, SGPPLVT04022752-799	118
Exh 12	2/12/98 Memo to A2 File from Philip Etter	123
Exh 13	10/1/86 Agency Memo to Jonathan Lash from Harold Garabedian	126
Exh 14	11/3/81 Air Pollution Control Regulations, SGPPLVT04023511-560	136
Exh 15	NATA Overview from epa.gov Website	141
Exh 16	Memo to Harold Garabedian from Bill Bress re "Chemical Fabrics Preliminary Report"	143
Exh 17	2/28/16 E-mail to Alyssa Schuren, et al., from Chuck Schwer	158
Exh 18	3/4/16 E-mail String re "North Bennington Question"	159
Exh 19	Trip Report for 7/12/89 Inspection	163
Exh 20	9/20/99 Memo to A2 File from Philip Etter	166

(The original exhibits were included
with the original transcript.)

S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED

by and between Counsel for the respective parties that this deposition is being taken in accordance with the Federal Rules of Civil Procedure; that all objections except as to form are reserved until the time of trial; that all objections as to Notice of this deposition are hereby waived; and that the witness has reserved the right to read and sign the deposition transcript.

* * *

MONDAY, SEPTEMBER 24, 2018

8:58 AM

THE VIDEOGRAPHER: Good morning. We're on the record at 8:58 AM, September 24th, 2018. Please note that the microphones are sensitive and may pick up whispering, private conversations, and cell interference.

This is media unit number 1 of the video-recorded deposition of David Kruger Mears taken by counsel for the defendant in the matter of James D. Sullivan vs. Saint-Gobain Performance Plastics filed in the U.S. District Court, District of Vermont, Civil Action No. 5:16-cv-00125. This deposition is being held at Biggam Fox Skinner, 453 Stone Cutters Way,

1 Montpelier, Vermont.

2 My name is Mary Doud from the firm Veritext,
3 and I'm the videographer. Court reporter is Johanna
4 Massé from Veritext. Okay. I'm not related to any
5 party in this action, nor am I financially interested
6 in the outcome.

7 Counsel and all present in the room and
8 everyone attending remotely will now state their
9 appearances and affiliations for the record. If there
10 are any objections to proceeding, please state them at
11 the time of your appearance beginning with the noticing
12 attorney.

13 MR. WEINRAUB: Good morning. This is David
14 Weinraub from Dechert LLP on behalf of the defendant,
15 Saint-Gobain.

16 MS. JOELSON: Emily Joselson, Langrock,
17 Sperry & Wool, on behalf of the plaintiffs.

18 THE VIDEOGRAPHER: Will the court reporter
19 please swear in the witness. Thank you. We may
20 proceed.

21 (The witness was sworn.)

22 THE REPORTER: Counsel, usual stips okay?

23 MR. WEINRAUB: Yes.

24 MS. JOELSON: Yes.

25 THE REPORTER: Thank you.

1 DAVID K. MEARS,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. WEINRAUB:

5 Q. Good morning, Mr. Mears.

6 A. Good morning.

7 Q. Have you ever given a deposition before?

8 A. I have not.

9 Q. Okay. Have you ever taken depositions before
10 as an attorney?

11 A. Yes.

12 Q. Okay. So you're on the other side of the
13 table, as it were. Are you generally familiar with
14 the -- with the ground rules for how depositions
15 proceed?

16 A. Yes.

17 Q. And in what jurisdictions have you taken
18 depositions as an attorney?

19 A. Generally I have taken depositions in Texas,
20 in Washington state, and Vermont. I have also during
21 my time as an attorney for the U.S. Department of
22 Justice taken depositions in Florida and New Jersey and
23 Massachusetts. There may be others that I just can't
24 recall.

25 Q. Okay. Fair enough. Let's go ahead and mark

1 your expert report.

2 (Deposition Exhibit No. 1 was
3 marked for identification.)

4 BY MR. WEINRAUB:

5 Q. Now, the document that's been marked as
6 Exhibit 1, is this the expert report that you've
7 submitted in this case?

8 A. It is.

9 Q. And is your CV attached to the exhibit?

10 A. Yes.

11 Q. Okay. Could you turn to your CV, please.

12 And under the heading "Experience," your CV
13 lists your professional experience beginning with your
14 job with the Texas Water Commission in February 1987;
15 is that correct?

16 A. Correct.

17 Q. And is this a current, accurate list of your
18 professional positions?

19 A. It's not up-to-date. I have just recently,
20 starting on September 5th, taken a position with the
21 National Audubon Society as the director of the Audubon
22 Vermont office.

23 Q. Is that a full-time position?

24 A. It is.

25 Q. So I take it you are no longer employed by

1 Vermont Law School. Is that correct?

2 A. Correct.

3 Q. And could you describe just in general terms
4 the circumstances of your departure from Vermont Law
5 School.

6 A. I resigned from the law school at the end of
7 June of this year to pursue other opportunities.

8 Q. In connection with any of the positions listed
9 on your CV, did you ever address issues related to
10 PFOA?

11 A. Yes. In a tangential way. When I taught a
12 course on hazardous and toxic substances last fall, we
13 discussed the situation in North Bennington as part of
14 my classroom discussions.

15 Q. Approximately how many classroom discussions
16 did you have that touched on the topic of PFOA?

17 A. It would have been a portion of one class.

18 Q. Did you distribute any printed material in
19 connection with that course that addressed PFOA?

20 A. No. But I did distribute the -- or asked the
21 students to review electronic versions of news articles
22 related to PFOA.

23 Q. Do you recall any particular news articles
24 that you asked the students to review?

25 A. I do. One was an article from the New York --

1 I believe it was New York Times Magazine about Rob
2 Bilott, and the other was a series of articles in
3 VTDigger called something along the lines of "Teflon
4 Town."

5 Q. You were commissioner of the Vermont
6 Department of Environmental Conservation for a period
7 of time; is that correct?

8 A. Correct.

9 Q. And that was during December 2011 to July
10 2015?

11 A. Correct.

12 Q. So I take it that you did not specifically
13 address any PFOA issues during your time with Vermont
14 DEC?

15 A. Correct.

16 Q. Were you personally involved in any
17 enforcement proceedings during your time at Vermont
18 DEC?

19 A. Yes.

20 Q. Approximately how many?

21 A. It's hard to give a specific answer because I
22 had varying levels of involvement with enforcement
23 actions while I was there. Partic- -- encouraging the
24 enforcement program was one of my priorities, but in
25 terms of kind of personal involvement, I would say it

1 was probably fewer than a half dozen.

2 Q. And could you generally describe what those
3 fewer than half dozen enforcement actions consisted of
4 in general terms?

5 A. In general they involved a couple of cases
6 where there were substantial violations and substantial
7 penalties or referrals to the Attorney General's
8 Office, or they involved particularly thorny policy or
9 legal questions.

10 Q. And is it fair to say that it was the
11 substantiality of those violations and the thorniness
12 of the policy and legal questions that warranted
13 elevating it to the level where the director was
14 personally involved with those proceedings?

15 MS. JOSELSON: Object to the form.

16 But you can answer.

17 A. Yes.

18 Q. You mentioned also being involved in
19 encouraging enforcement actions. Could you describe
20 what -- what you mean by that.

21 A. The -- there were many processes in the
22 department, including in the enforcement program, that
23 I wanted to improve the efficiency and effectiveness of
24 the programs, and I also wanted it to be clear to the
25 staff and to the leadership of that program that there

1 was -- that they were independent of any concerns about
2 political pressure. I saw it as one of my roles to
3 make sure that they had unimpeded ability to make
4 decisions about the enforcement work that they were
5 doing.

6 Q. Did you feel that prior to your taking on the
7 commissioner role, that political pressure within the
8 department had been a problem?

9 A. Anec- -- I had no personal or direct knowledge
10 of that, but anecdotally and from staff accounts, there
11 had been occasions in which pressure from governors or
12 secretaries of the agency or in some cases legislators
13 had interfered with the enforcement actions.

14 Q. And referring to those anecdotes that you had
15 heard about during that time frame, do you recall what
16 any of the companies involved were?

17 A. I don't recall specifics. I do recall that
18 there was a reference to a ski area case, a reference
19 to IBM. Beyond that I can't -- and maybe Husky, but I
20 can't -- I can't recall specifics of those particular
21 cases.

22 Q. Okay. During your time with Vermont DEC, did
23 you focus on any particular regulatory programs more
24 than others, or would you say you were evenly
25 distributed across all regulatory programs? Or however

1 you would like to describe it.

2 A. I would say that I spent the most significant
3 amount of my time on clean water issues involving Lake
4 Champlain, but not dramatically so. I -- I worked
5 fairly broadly across all of the various programs.

6 Q. Did you do any work in connection with
7 Vermont's air toxics program?

8 A. I'm not recalling any specific project or
9 issue that I worked on related to air toxics off the
10 top of my head, but I definitely worked with that team
11 of folks and with the air program generally.

12 Q. And who were the members of the air program
13 during your time at Vermont DEC?

14 A. The director was Dick Valentinetti of the --
15 what became then known as the Air and Climate division;
16 and following Dick Valentinetti, Elaine O'Grady was the
17 director. And there was -- of course, that was a large
18 division, so there were quite a number of folks.

19 Q. Did you interact with the secretary of
20 Vermont's Agency for Natural Resources during your time
21 at Vermont DEC?

22 A. Daily, yes.

23 Q. And who was the ANR secretary during that
24 time?

25 A. Deb Markowitz.

1 Q. Did you ever discuss any air toxics issues
2 with Deb Markowitz during your time with Vermont DEC?

3 A. Not that I recall. But I'm remembering --
4 there was an issue involving a distillery, and this
5 isn't a classic air toxics issue, but there was an
6 issue of the ethanol that escapes from the barrels at
7 distilleries that have -- can have the effect of
8 fostering a toxic kind of mold that can grow around
9 those facilities, so not exactly air toxics, but just
10 to amend my prior answer. But in terms of Secretary
11 Markowitz, I don't recall specifically discussing air
12 toxics issues with her.

13 Q. Did you interact with any toxicologists at --
14 within ANR during your time at Vermont DEC?

15 A. Not that I recall. We relied on the state
16 toxicologist at the Department of Health primarily for
17 issues related to toxics.

18 Q. And you -- you perfectly anticipated my next
19 question, which is, Did you interact with any
20 toxicologists within the state Department of Health?

21 A. Yes.

22 Q. And for what general purposes?

23 A. For generally tackling issues of are -- were
24 we doing enough to deal with known contaminants, known
25 toxics, as well as emerging toxics. It covered quite a

1 broad number of chemicals and issues.

2 Q. And did those discussions with the Department
3 of Health toxicologist encompass varying regulatory
4 programs, water, air, or otherwise?

5 A. Primarily drinking water, some surface water.
6 I'm not recalling a discussion about air toxics in
7 particular, but that doesn't mean that we didn't have
8 those discussions. I just can't recall them.

9 Q. Fair enough. Do you recall the names of any
10 Department of Health toxicologists that you worked
11 with?

12 A. The one that I worked with initially was Bill
13 Bress, who had been there, of course, quite a long
14 time, was very well respected. I'm -- there was
15 another toxicologist we worked with after he left, but
16 I cannot recall her name off the top of my head. She
17 was also quite impressive.

18 Q. Have you ever been retained as an expert
19 witness in any cases besides this one?

20 A. No.

21 Q. Within the scope of this litigation, what do
22 you consider to be your field or fields of expertise?

23 A. Environmental law and policy with a particular
24 focus on pollution laws and pollution control policy.

25 Q. Are you an expert in environmental

1 engineering?

2 A. No.

3 Q. Who retained you as an expert in this case?

4 A. The attorneys for the plaintiffs.

5 Q. And when were you retained?

6 A. I can't remember the precise date, but it was
7 in the -- the late spring, early summer, May or June,
8 of 2018.

9 Q. And what were you asked to do, or what was the
10 scope of your retention?

11 A. I was asked to review an expert report that
12 had been filed by Felix Flechas and to provide an
13 opinion in response to that.

14 Q. And turning back to Exhibit 1, which is your
15 expert report, is this the report that you prepared in
16 response to Mr. Flechas' report?

17 A. Yes.

18 Q. And did you draft this report yourself?

19 A. I did draft it in collaboration with the
20 attorneys for the plaintiffs.

21 Q. Have you prepared any other reports in this
22 case besides what's been marked as Exhibit 1?

23 A. No.

24 Q. Are all of your opinions that you intend to
25 offer in this case set forth in the report?

1 A. Yes.

2 Q. Have you been asked to do any work in this
3 case that is not reflected in the report?

4 A. No.

5 Q. And are all the materials that you relied on
6 in forming your opinions, are they referenced in your
7 report?

8 A. Yes.

9 Q. Did you consider any additional materials that
10 you did not rely on and that are not referenced in the
11 report?

12 A. I'm sorry. I didn't understand the question.

13 Q. Yeah. It wasn't a very good question. Other
14 than the materials that you identified in -- in your
15 report as materials that you relied on, did you
16 consider any additional materials?

17 A. I'm not sure what you mean by "consider." I
18 mean, I certainly have -- you know, through the course
19 of my work and experience working on pollution issues
20 and toxics, I have a whole set of contexts that inform
21 my opinion. I also have been paying attention to the
22 unfolding issues in North Bennington over the past
23 several years, so that backdrop and context was all
24 information that informed my opinion, but I can't think
25 of any specific materials or information that I

1 considered outside of the scope of the information
2 provided to me by the plaintiffs and -- and Mr.
3 Flechas' report and Dr. Hopke's report.

4 Q. Have you ever resided in Bennington, Vermont?

5 A. I have not.

6 Q. Ever resided in North Bennington?

7 A. No.

8 Q. Have you ever worked in either Bennington or
9 North Bennington?

10 A. I've never had a position of employment
11 where -- where it was located in those places.

12 Q. Have you ever personally consumed drinking
13 water in Bennington or North Bennington?

14 A. Probably. I can't recall, but I've certainly
15 been to restaurants and people's homes in the
16 community.

17 Q. Okay. Was there ever a period of time where
18 you were regularly consuming drinking water in
19 Bennington or North Bennington?

20 A. No.

21 Q. Okay. Sitting here today, is there anything
22 in your expert report that you want to correct or
23 supplement?

24 A. I do want to -- well, I think I've already
25 referenced the fact that I now have a different

1 position than is reflected in my CV, but beyond that,
2 no.

3 Q. So other than updating your employment
4 history, there are no other changes to your -- your
5 prior employment history?

6 A. Correct.

7 Q. And no changes to the -- to the opinions that
8 you're offering?

9 A. Correct.

10 Q. Okay. Have you ever met Dr. Hopke?

11 A. I have not.

12 Q. Have you ever spoken with him by phone or
13 e-mail or otherwise?

14 A. No.

15 Q. To your knowledge, did Dr. Hopke review your
16 report before it was finalized?

17 A. I don't believe that he did. He may have, but
18 I don't think so.

19 Q. Have you discussed your work in this case with
20 anyone other than plaintiffs' counsel?

21 A. No.

22 Q. Since leaving your position as director of
23 Vermont DEC, have you stayed in contact with any of
24 your former colleagues there?

25 A. Yes.

1 Q. And which colleagues have you stayed in touch
2 with?

3 A. Many of them. Some who have left. Alyssa
4 Schuren is a -- is a friend and colleague. Trey Martin
5 is a friend and colleague. I interact with Matt
6 Chapman fairly frequently at bar events and bump into
7 John Schmeltzer once in a while at cross country races.
8 And then I go to social events where many of those
9 folks are present, but those are the folks I can think
10 of that may have had something or anything to do with
11 the North Bennington issues.

12 Q. Have you ever discussed PFOA issues with any
13 of your former DEC colleagues?

14 A. Yes.

15 Q. On approximately how many occasions?

16 A. Maybe a dozen.

17 Q. And which of the colleagues that -- that
18 you've listed that you keep in touch with have you
19 discussed PFOA with?

20 A. All of them.

21 Q. And over what time period did you have those
22 discussions?

23 A. The last -- really since the information
24 emerged about the contamination, which I can't recall
25 the precise dates, but it seems to me it's been at

1 least two years.

2 Q. What was the sum and substance of those
3 conversations?

4 A. I can't recall the specifics. I mean,
5 generally it -- it is one of the most significant
6 environmental issues and contam- -- groundwater
7 contamination issues in the state for many years, so
8 would typically ask for an update. You know, not that
9 they had any obligation to tell me anything, but, you
10 know, just out of curiosity, like what's the latest?

11 So I might get an update from John about --
12 John Schmeltzer about his last visit and what they had
13 learned in terms of monitoring, or I might learn from
14 Alyssa when she was at the department what their latest
15 efforts were to do outreach to the community, or from
16 Matt I might have heard about the latest procedural
17 steps in the negotiation -- or the litigation between
18 the State and Saint-Gobain. It was all general.
19 Nothing specific.

20 Q. Did any of these conversations occur after you
21 were retained as an expert in this case earlier this
22 year?

23 A. Not that I can recall, but I couldn't swear to
24 that. But if there were conversations, they were at a
25 general level.

1 Q. As best as you can recall, have you told any
2 of these folks that you've been retained as an expert
3 in this case?

4 A. I think I've mentioned it to Matt Chapman.
5 I'm not certain.

6 Q. And do you recall anything that Matt Chapman
7 may have said in response?

8 A. No. It wasn't a substantive conversation, if
9 we had it.

10 Q. During any of these conversations, did any of
11 these individuals say anything on the subject of
12 ChemFab's or Saint-Gobain's regulatory compliance
13 during the period that they were operating plants in
14 Bennington and North Bennington?

15 MS. JOSELSON: Object to the form.

16 But you can answer.

17 A. No. I can't recall talking about anything
18 that's kind of the substance of this in terms of the
19 history of ChemFab's interactions with the State. It
20 was mostly about what's -- what have we learned
21 recently about the science of the site, the
22 hydrogeology, the -- the communications with the
23 community, and of looking forward what are the -- the
24 solutions.

25 Q. Have you had any written communications with

1 any of these folks regarding PFOA issues?

2 A. No.

3 Q. We've discussed Dr. Hopke. Have you had any
4 conversations with any other plaintiffs' experts in
5 this case?

6 A. No.

7 Q. And have you discussed PFOA issues with any
8 current or former residents of Bennington or North
9 Bennington?

10 A. Yes.

11 Q. And which residents have you had conversations
12 with?

13 A. I don't recall their names.

14 Q. Do you recall approximately how many
15 conversations?

16 A. It would have been a relatively short burst of
17 conversations that happened while I was -- maybe in
18 2015 or '16. Right -- right when the first information
19 came out about the groundwater contamination, I was at
20 the time the head of the Environmental and Natural
21 Resources Law Clinic at Vermont Law School, and we were
22 working with the Toxics Action Center in arranging for
23 some community meetings with residents and citizens of
24 North Bennington, and we had two kind of meetings that
25 I recall that would have been in people's living rooms.

1 Q. And what were the sum and substance of those
2 living room conversations?

3 A. They were simply explaining to them the nature
4 of the -- the legal framework, the regulatory system
5 around the pollution laws and what their -- what was
6 likely to happen in terms of the regulatory process and
7 what their opportunities to engage in that process
8 would be.

9 Q. And was there a particular regulatory process
10 that you discussed during those conversations?

11 A. At that time -- it's a little fuzzy, but my
12 recollection is at the time the State had begun to have
13 a set of public meetings and was inviting the public to
14 weigh in and -- with their concerns and also to -- to
15 share what the State was planning to do. So my
16 recollection is that it would have been fairly general
17 that I would have been explaining the way the Hazardous
18 Waste Cleanup Program worked, how decisions were made
19 under that program, and also how the enforcement
20 program generally worked and their opportunities to
21 weigh in on that. Again, it's -- enough years have
22 gone by now, I can't -- can't remember the details.

23 Q. And apart from the two living room
24 conversations, did you attend any public meetings on
25 PFOA issues?

1 A. I did not.

2 Q. Were you involved in arranging any of those
3 meetings?

4 A. The public meetings?

5 Q. Yes.

6 A. No.

7 Q. So if you'll turn to your report, at the very
8 bottom of page 2 and then carrying over to top of page
9 3. So the carry-over sentence that begins at the end
10 of page 2 states, I agree with and adopt Dr. Hopke's
11 opinions concerning defendant's violations of Vermont
12 air pollution regulations and rely upon the documents
13 he relied upon.

14 Do you see that?

15 A. I do.

16 Q. How did you determine which documents Dr.
17 Hopke relied on in connection with his regulatory
18 opinions as opposed to his opinions on other issues?

19 A. I read his report, and I was also given access
20 to the documents that he cited.

21 Q. Did you personally identify which documents
22 related to regulatory issues as opposed to other
23 issues?

24 A. I don't recall making that distinction in my
25 review. There was quite a lot of documents, and I read

1 as many of them as I could.

2 Q. And are you aware that Dr. Hopke has issued
3 more than one report in this case?

4 A. I have seen reference to other reports, though
5 I have not reviewed them.

6 Q. Did you read just one of his reports?

7 A. Yes.

8 MR. WEINRAUB: Could we mark this one as
9 Exhibit 2.

10 (Deposition Exhibit No. 2 was
11 marked for identification.)

12 BY MR. WEINRAUB:

13 Q. And do you recognize the document that's been
14 marked as Exhibit 2?

15 A. Yes, I do.

16 Q. Is this the report that -- of Dr. Hopke's that
17 you reviewed in connection with your report?

18 A. Yes.

19 Q. And did you adopt all of Dr. Hopke's opinions
20 stated in this report?

21 A. Yes.

22 Q. Are there any statements in this report by Dr.
23 Hopke that you disagree with?

24 A. No. There -- there is one characterization
25 that I can't recall off the top of my head that I

1 thought he might have had -- there was a memo that he
2 referenced that I thought he might have misunderstood
3 who had been the origin of the memo. It was a phone --
4 phone memo from Chris Jones to somebody, and I think in
5 Dr. Hopke's report he referenced it as though it was
6 coming from the -- the person at ChemFab that Mr. Jones
7 had spoken to when I think in fact it was Mr. Jones
8 describing his conversation. So it was a small error,
9 but other than that, I didn't see anything that I
10 disagreed with or had questions about.

11 Q. In your report did you rely on any documents
12 beyond those that Dr. Hopke relied on in his report?

13 A. No.

14 Q. Do you know how Dr. Hopke determined which
15 documents to rely upon in preparing his report?

16 A. I do not.

17 Q. Do you know who provided Dr. Hopke with those
18 documents?

19 A. I do not.

20 Q. Do you know whether Dr. Hopke did any
21 independent literature review or document review of his
22 own before selecting those documents?

23 A. I have the impression from the compilation
24 that he did of citizen complaints that he had done some
25 independent investigation, but I'm not certain.

1 Q. Have you yourself done any independent
2 literature or document review in connection with your
3 report?

4 A. No.

5 MR. WEINRAUB: Can we mark this one as Exhibit
6 3, please.

7 (Deposition Exhibit No. 3 was
8 marked for identification.)

9 BY MR. WEINRAUB:

10 Q. Do you recognize the document marked as
11 Exhibit 3?

12 A. I do.

13 Q. Is this your billing records in this case
14 through August 30 of 2018?

15 A. Yes.

16 Q. And do you recognize this as a document that
17 was produced to us in connection with a subpoena?

18 A. Yes.

19 Q. At the top the document refers to a billing
20 rate of \$400 per hour. Do you see that?

21 A. Yes.

22 Q. And is that in fact your billing rate in this
23 case?

24 A. Yes.

25 Q. Do you charge any different rate for

1 testifying at today's deposition?

2 A. No.

3 Q. Should you testify at trial, do you expect to
4 charge a different rate for trial testimony?

5 A. No.

6 Q. Does this document accurately summarize your
7 work on this case through August 30 of 2018?

8 A. Yes.

9 Q. And have you done additional work on this case
10 since August 30 of 2018?

11 A. Yes.

12 Q. And approximately how many hours, as best as
13 you can estimate?

14 A. Somewhere between another six or eight hours.

15 Q. And was that in preparation for today's
16 deposition?

17 A. Yes.

18 Q. Did you do any work after August 30 other than
19 preparing for today's deposition?

20 A. Not that I recall.

21 Q. In general terms, what did you do to prepare
22 for the deposition?

23 A. Mostly I just read through the documents a
24 second time, reading -- read through the various
25 reports and going back to the underlying source

1 documents.

2 Q. Other than any discussion with plaintiffs'
3 counsel, have you had any discussions with anyone else
4 in preparation for your deposition today?

5 A. No.

6 Q. Exhibit 3 includes one entry dated July 16 of
7 one hour spent "Reviewing new July 2018 DEC report on
8 PFAS sampling." Do you see that?

9 A. I do.

10 Q. Why did you review that report?

11 A. Counsel for plaintiffs e-mailed it, I believe
12 to a number of the experts, and so I took the time to
13 read it.

14 Q. Does that report have any particular
15 significance to your opinions in this case?

16 A. No.

17 Q. Switching topics, I'd like to discuss the
18 Clean Air Act at a sort of Clean Air Act 101 level to
19 make sure I understand in general how the system works.

20 Am I correct that the Clean Air Act
21 establishes various regulatory programs?

22 A. Yes.

23 Q. And one category of those programs involves
24 regulation of new and existing sources of air
25 pollution?

1 A. Yes.

2 Q. And do those programs focus in part on
3 ensuring attainment and maintenance of National Ambient
4 Air Quality Standards?

5 A. Yes.

6 Q. And that's abbreviated NAAQS?

7 A. Correct.

8 Q. In connection with the NAAQS program, does the
9 Clean Air Act distinguish between attainment areas and
10 nonattainment areas?

11 A. Yes.

12 Q. And is an attainment area a geographic region
13 that is at that time attaining the NAAQS standards?

14 A. Correct. Although it -- it's important to
15 note that an area can be an attainment for some
16 criteria pollutants and not an attainment for others.

17 Q. And depending on the status of an area as
18 attainment or nonattainment for a particular criteria
19 pollutant, do the regulations differ for sources within
20 that area?

21 A. Yes.

22 Q. And are the regulations more strict for
23 sources located within nonattainment areas?

24 A. Yes.

25 Q. During the time that ChemFab operated its

1 Bennington facility, was that facility located in an
2 attainment or nonattainment area with respect to the
3 NAAQS criteria pollutants?

4 A. I don't know.

5 Q. And same question for the North Bennington
6 facility.

7 A. I don't know, either.

8 Q. Does the NAAQS program also distinguish
9 between major and minor sources?

10 A. Yes.

11 Q. And to your knowledge, was ChemFab's
12 Bennington facility a major or minor source with
13 respect to the NAAQS program?

14 A. I don't know.

15 Q. Same question for the North Bennington
16 facility.

17 A. I don't know.

18 Q. Under the Clean Air Act, are new sources
19 subject to preconstruction review to ensure attainment
20 of NAAQS standards and to ensure application of
21 up-to-date control technologies?

22 MS. JOELSON: Object to the form.

23 But you can answer.

24 A. There was kind of two questions embedded in
25 there.

1 Q. Yeah. That's fair enough. I was -- I was
2 getting ahead of myself. Let me break that down.

3 Under the Clean Air Act, are new sources
4 subject to preconstruction review?

5 A. Yes.

6 Q. And is one purpose of preconstruction review
7 to -- to ensure attainment of NAAQS standards?

8 A. That's the ultimate goal, although they
9 typically use technology-based standards, and they may
10 also require offsets or mitigation depending on whether
11 it's an attainment or nonattainment area.

12 Q. Under the Clean Air Act, is each state
13 responsible for developing a state implementation plan
14 to regulate sources within its borders?

15 A. Yes.

16 Q. Is each state's implementation plan required
17 to be at least as stringent as the Clean Air Act?

18 A. Correct. Meaning that the state program can
19 be more stringent than the federal program.

20 Q. And state implementation plans, or SIPs for
21 short, are subject to EPA review and approval, correct?

22 A. Correct.

23 Q. SIPs can vary from one state to the next,
24 right?

25 A. Yes.

1 Q. Is it fair to say, though, that all states'
2 SIPs have many features in common?

3 A. Yes. And that's because EPA has a set of
4 minimum requirements that apply to all states. Also
5 the strategies -- states tend to replicate successful
6 strategies from each other.

7 Q. Can you identify any features of Vermont's SIP
8 that make it significantly more stringent than the
9 Clean Air Act?

10 A. Not off the top of my head, although generally
11 Vermont has taken a much more stringent approach to
12 toxics across all of its programs, but I can't think of
13 a -- I'm not sufficiently familiar with the details of
14 Vermont's state implementation plan at the moment to be
15 able to recite a specific area in which it's
16 significantly more stringent.

17 Q. Focusing on toxics programs, in what ways is
18 Vermont's SIP significantly more stringent than the
19 Clean Air Act?

20 A. I can't give you a specific example. I was
21 just noting that as a general matter Vermont, between
22 the Department of Environmental Conservation and the
23 Health Department, had generally taken a more cautious
24 approach, a more conservative approach, to protecting
25 public health than has EPA.

1 Q. Has that been true throughout the 1970s to the
2 present, or has it changed at some point along the
3 line?

4 A. That's been a consistent theme in the state of
5 Vermont through -- through the passage of all the
6 environmental laws.

7 Q. And as a related question, can you identify
8 any feature of Vermont's SIP that makes it
9 significantly more stringent than other states' SIPs?

10 A. I can't identify a specific example.

11 Q. So we've discussed criteria pollutants in
12 connection with the Clean Air Act's NAAQS program.

13 A. I'm sorry. Can I -- can I go back and amend
14 my answer briefly?

15 Q. Yeah. Please.

16 A. I just realized one area I am -- I am more
17 familiar with that I'm -- know that Vermont's program
18 is more stringent is in the area of mobile sources.
19 Vermont has joined with a number of other states,
20 including California, to adopt more stringent
21 restrictions on mobile source emissions.

22 Q. Mobile sources would include things like
23 vehicles?

24 A. Correct.

25 Q. Are there any particular requirements on

1 mobile sources that Vermont's program focuses on?

2 A. There's a set of standards that are often
3 referred in shorthand to as the California standards
4 because in addition to the national standards set by
5 EPA, California's allowed to set its own standards.
6 It's the only state that's given that option. But
7 other states are allowed to opt in to the California
8 standards, and Vermont is one of a handful of states
9 that have done so.

10 Q. Has Vermont also joined with other states in
11 regulating greenhouse gases?

12 A. Yes.

13 Q. And do you have any personal experience with
14 that -- with that program from your time at Vermont
15 DEC?

16 A. Yes.

17 Q. And could you describe just the sum and
18 substance of what that -- what that set of requirements
19 is and how Vermont cooperates with other states in
20 implementing it.

21 MS. JOSELSON: Object to the form.

22 But you can answer.

23 A. I understand the question. There's a --
24 there's a couple of -- of ways. One relates to the
25 mobile source controls along with a group of other

1 states. The California standards are in part focused
2 on addressing greenhouse gas emissions.

3 In addition, there's a collaborative of states
4 that are engaged in promoting the use of battery
5 electric vehicles, and I'm not certain if that's worked
6 its way into the state implementation plan or not.

7 The third area that I know is -- is an active
8 area of development over the past decade has been the
9 State's collaboration as part of the Regional
10 Greenhouse Gas Initiative to promote investment in
11 efficiency but also using a cap and trade program
12 associated with greenhouse gas emissions as the basis
13 of raising the funds for the efficiency investments.

14 Q. Okay. Thank you. Turning back to criteria
15 pollutants, we've discussed these in connection with
16 the NAAQS program. Has PFOA or APFO ever been
17 identified as a criteria pollutant?

18 A. No.

19 Q. And just to put a finer point on it, has APFO
20 or PFOA ever been identified either by EPA or by
21 Vermont regulators as a criteria pollutant?

22 A. No.

23 Q. In addition to national air quality standards,
24 the Clean Air Act also addresses certain specific air
25 pollution problems, correct?

1 A. Yes.

2 Q. One being acid rain?

3 A. Correct.

4 Q. And another being hazardous air pollutants?

5 A. Correct.

6 Q. Does the Clean Air Act require EPA to regulate
7 emissions of hazardous air pollutants?

8 A. Yes.

9 Q. And in connection with that requirement, does
10 EPA publish a list of hazardous air pollutants?

11 A. Yes.

12 Q. Has PFOA or APFO ever appeared on EPA's list
13 of hazardous air pollutants?

14 A. No.

15 Q. To your knowledge, can anyone petition EPA to
16 request that a new substance be considered for
17 inclusion on EPA's hazardous air pollutant list?

18 A. Yes.

19 Q. And to your knowledge, has Vermont DEC ever
20 petitioned EPA to include PFOA or APFO on its hazardous
21 air pollutant list?

22 A. Not to my knowledge.

23 Q. Have you yourself ever petitioned EPA to
24 include PFOA or APFO on the hazardous air pollutant
25 list?

1 A. No.

2 Q. Does Vermont separately maintain a list of
3 hazardous air contaminants?

4 A. Yes.

5 Q. Has PFOA or APFO ever appeared on Vermont's
6 hazardous air contaminant list?

7 A. I don't know. But as far as -- to my
8 knowledge, no. I mean, it may have. I don't know
9 what's happened in recent -- the past year or so.

10 Q. In any of your discussions with current or
11 former DEC personnel, has the subject of adding PFOA or
12 APFO to Vermont's hazardous air contaminants list ever
13 come up?

14 A. Not specifically, although I recall, you know,
15 having a conversation, asking the question of whether
16 or not the State would consider -- was considering that
17 either in the context of the -- any of the programs,
18 drinking water, air pollution, hazardous waste
19 management.

20 Q. Did you ask that question generally without
21 referencing any specific programs, or did you ask it
22 specifically for each program?

23 A. Generally. Without reference to specific
24 programs.

25 Q. And do you recall what the response was to

1 your question?

2 A. That it was something that the State was
3 considering.

4 Q. Who -- who made that statement?

5 A. I honestly can't remember. It was probably
6 Matt Chapman, would have been the person. The reason I
7 think it was probably Matt is I was asking the -- as I
8 recall, I was asking the question during the time that
9 I taught my course and we had the class discussion on
10 the North Bennington situation within the class, and
11 I -- I think I called Matt just to ask him what was
12 going on, but I'm not certain. It might have been John
13 or Chuck Schwer or someone else in the program.

14 Q. Okay. Fair enough. So whoever it was, Matt
15 or Chuck or whoever else, when they said that the State
16 was considering regulating APFO or PFOA, did they
17 specifically reference the hazardous air contaminant
18 list or any other regulatory program?

19 MS. JOSELSON: Object to the form.

20 But you can answer.

21 A. Not that I recall.

22 MR. WEINRAUB: Can we mark Exhibit 4, please.

23 (Deposition Exhibit No. 4 was
24 marked for identification.)

25 / / /

1 BY MR. WEINRAUB:

2 Q. And, Mr. Mears, I'll represent to you that
3 Exhibit 4 is an excerpt of the Vermont air pollution
4 control rules, including -- including amendments
5 through November 30, 2016, and the excerpt consists of
6 Appendix B, which is the hazardous air contaminants
7 list.

8 You're familiar with the Vermont air pollution
9 control rules, I take it?

10 A. Yes.

11 Q. Does that -- does my characterization of the
12 document appear accurate?

13 A. I understand, yes. This looks -- yes.
14 That -- this is the right list.

15 Q. Okay. So -- and you're welcome to peruse the
16 list as long as you need, but I'll -- I'll just preview
17 my question for you. My question is, Can we agree that
18 at least as of November 2016 APFO and PFOA were not
19 included on Vermont's HAC list?

20 A. Yes.

21 Q. Okay. Thank you.

22 Okay. Let's turn back to your report, which
23 is Exhibit 1.

24 MR. WEINRAUB: Actually, I'll pause for a
25 moment. I'm at a transition point, and I am happy to

1 keep going, but if anybody would like a break,
2 please --

3 MS. JOSELSON: I like to take a break every
4 hour for just a little while.

5 MR. WEINRAUB: Sure. That's fine with me.

6 THE WITNESS: That would be great.

7 MR. WEINRAUB: So take ten minutes?

8 THE VIDEOGRAPHER: Going off the record at
9 9:57.

10 (A recess was taken.)

11 THE VIDEOGRAPHER: We're back on the record at
12 10:07.

13 BY MR. WEINRAUB:

14 Q. Mr. Mears, if we could turn to your report at
15 page 3.

16 A. Yes.

17 Q. And specifically at the -- the heading number
18 1, which states "Mr. Flechas shows limited familiarity
19 with Vermont's air pollution statute and regulations
20 and their enforcement."

21 And then below that is the statement that "Mr.
22 Flechas has limited familiarity with Vermont's air
23 pollution statute and regulations. Other than
24 reviewing documents provided to him by Saint-Gobain, he
25 has no prior experience with the Vermont regulatory

1 scheme." Do you see that?

2 A. Yes.

3 Q. And is that language that you entered into
4 this report?

5 A. Yes.

6 Q. Now, you have adopted all of Dr. Hopke's
7 regulatory opinions in this case, correct?

8 A. Correct.

9 Q. And to your understanding, does Dr. Hopke have
10 any personal history or involvement with Vermont's air
11 pollution -- air pollution control rules?

12 A. Not that I'm aware of.

13 Q. I take it that Dr. Hopke's lack of prior
14 experience with Vermont regulation was not a concern
15 for you?

16 A. No. He did a very careful job of evaluating
17 the record, and that was the primary use that I made of
18 his report was the very careful analysis of the
19 regulatory record.

20 Q. Your report also makes the statement that Mr.
21 Flechas' résumé -- and I'm still at that first
22 paragraph under the heading on page 3. Your report
23 states that Mr. Flechas' résumé "reveals no prior
24 experience with the federal CAA air pollution control
25 regulatory scheme." Do you see that?

1 A. I do.

2 Q. Are you aware that Mr. Flechas was an
3 enforcement officer at EPA for 30 years?

4 A. I did see that. It -- my impression was that
5 his focus was on enforcement of the Resource
6 Conservation Recovery Act.

7 Q. Would you agree, though, that the EPA
8 enforcement program trains inspectors to determine
9 regulatory requirements across all environmental
10 programs?

11 MS. JOSELSON: Object to the form.

12 But you can answer.

13 A. I don't know how they train their inspectors
14 and enforcement teams within the programs.

15 Q. Do you know the criteria for EPA issuing
16 inspector credentials to its enforcement officers?

17 A. I do not.

18 Q. I want to talk generally about methodology.
19 And to begin, at pages 4 through 7 of your report,
20 you've opined that ChemFab and Saint-Gobain violated
21 various provisions of Vermont's air pollution control
22 rules. Correct?

23 A. I'm sorry. Could you repeat the question?

24 Q. So looking generally at pages 4 through 7 of
25 your report.

1 A. Correct.

2 Q. And maybe the best way to do it is if we stay
3 on page 4 and look at heading number 2.

4 A. Okay.

5 Q. Where it says "ChemFab/Saint-Gobain violated
6 Vermont air pollution control permits and regulations."

7 A. Yes.

8 Q. And that section continues through the first
9 half of page 7, correct?

10 A. Yes.

11 Q. And within those pages, you've identified
12 various subsets of regulatory violations, correct?

13 A. Yes.

14 Q. Could you describe the methodology that you
15 used in reaching these opinions.

16 A. Yes. I looked primarily at the record and
17 exchanges between DEC and ChemFab and looked to the
18 record of complaints about odors, the inspection
19 reports from DEC inspectors, and the formal enforcement
20 actions that were taken, as well as the correspondence
21 that referenced noncompliance or areas where there was
22 serious questions about compliance.

23 Q. How did you distinguish between areas where
24 there was noncompliance versus areas where there were
25 serious questions about compliance?

1 A. Well, the most obvious areas where there was
2 clear noncompliance were where there were the
3 assurances of discontinuance, where there were clearly
4 documented violations, agreement by ChemFab that there
5 were violations, and then a formal agreement to resolve
6 those.

7 There were also violations that were noted in
8 the -- some of the inspection reports.

9 There were -- and then at another level was
10 the unresolved odor complaints.

11 And the final category, I can recall in
12 particular a memo from Dick Valentinetti referencing --
13 a 1999 report referencing emissions from the cupolas
14 that -- that raised a serious question of whether or
15 not there had been an ongoing noncompliance.

16 So there was a range from -- from formally
17 designated, agreed to, and identified to identified in
18 inspection reports to indicated by the odor complaints
19 to at least a question raised in a -- an inspection
20 report or a memo.

21 Q. Does your report ever speak in terms of
22 serious questions of potential noncompliance, or does
23 it consistently speak in terms of actual violations?

24 A. Speaks primarily in terms of actual
25 violations.

1 Q. So when there are merely questions of
2 potential noncompliance, did you treat those as
3 violations?

4 A. No.

5 Q. When what you consider to be a violation
6 occurred but it was not designated as such in an AOD or
7 in an inspection report, how did you determine that an
8 actual violation had occurred?

9 MS. JOSELSON: Object to the form.

10 But you can answer.

11 A. If the facts in the record as indicated by
12 either an inspector, which I would give the most
13 credibility to, raises -- identifies something as a
14 violation, I counted that as a violation. The fact of
15 the ongoing odor complaints that were never resolved
16 seems self-evident that -- that that was a set of
17 unresolved problems at the plant that reflected
18 violations.

19 Beyond that, the -- the concerns or questions
20 that were raised I did not treat as violations, but I
21 think it's important context in response to Mr.
22 Flechas' assertions that the State was in full support
23 of the actions that ChemFab was taking.

24 Q. Do you consider ongoing complaints to
25 constitute violations?

1 A. No. But I would construe the emissions that
2 gave rise to those complaints to be violations --

3 Q. Speaking of --

4 A. -- and the complaints themselves to be
5 significant and important evidence of that.

6 Q. So you referenced odor complaints in
7 particular. Is each individual odor complaint
8 tantamount to a violation?

9 A. An isolated complaint standing alone and
10 unverified by either anyone at the plant or a state
11 inspector, no. But if it's verified, then I would
12 consider that to be significant evidence of a
13 violation. And if it were corroborated by multiple
14 other people in the community who experienced the same,
15 you know, sort of emissions as a -- as a nuisance
16 condition, then I would consider that to be significant
17 evidence of a violation.

18 Q. During your time at Vermont DEC, did you ever
19 make regulatory determinations regarding odor
20 complaints?

21 A. Personally, no.

22 Q. During your time at Vermont DEC, did you ever
23 make regulatory determinations regarding visible
24 emissions?

25 A. Regarding what kind of emissions?

1 Q. Visible emissions.

2 A. Visible emissions. No.

3 Q. During your time at Vermont DEC, did you ever
4 make determinations regarding the maintenance of
5 catalytic abators?

6 A. No.

7 Q. Are you familiar with the regulatory criteria
8 for determining whether an odor complaint rises to the
9 level of an objectionable odor violation?

10 A. Generally, yes. I have not -- as you noted
11 earlier, I have not made that determination myself.

12 Q. In reviewing the regulatory record regarding
13 odor complaints in this case, did you apply those
14 criteria to determine whether an objectionable odor
15 violation had been demonstrated?

16 A. I did not apply them myself directly, but I
17 did rely on the statements of the DEC inspectors as
18 well as some statements by ChemFab environmental staff.
19 Or I'm not sure what their job was at ChemFab, but
20 there were definitely ChemFab employees that also
21 described and acknowledged the nuisance conditions.

22 Q. Do you know what the regulatory criteria are
23 for determining whether a nuisance violation has
24 occurred as distinct from an objectionable odor
25 violation?

1 A. I'm not sure that they're that distinct, but
2 yes, I'm generally familiar with the -- the criteria
3 for nuisance conditions, which could include
4 objectionable odors.

5 Q. During your time at Vermont DEC, did you ever
6 personally make a regulatory determination regarding
7 nuisance violations?

8 A. Not to the extent that I personally made the
9 determination, but I certainly signed off on
10 enforcement orders and accepted the determinations of
11 my expert staff who made those determinations.

12 Q. To make sure I understand your methodology,
13 you reviewed the documents identified by Mr. Hopke,
14 correct?

15 A. Yes.

16 Q. And through your review of the documents, you
17 identified what you take to be the relevant facts?

18 A. Correct.

19 Q. And then you drew inferences from those facts?

20 A. Yes.

21 Q. And you identified what you consider to be the
22 relevant law or regulations?

23 A. Yes. There's an interim step in there, which
24 is also that the -- the inferences were based on who
25 the -- kind of the weight of the evidence, including

1 the nature of the people -- the experts on-site making
2 interpretations of that evidence.

3 Q. And then as a next step, did you identify what
4 you consider to be the relevant law and regulations?

5 A. Yes.

6 Q. And then you would apply the law to the facts
7 and the inferences as you understand them to be?

8 MS. JOELSON: Object to the form.

9 But you can answer.

10 A. Yes. But again, in many ways I also give
11 significant deference to the interpretations of the --
12 that information and the -- the application of that to
13 the permit requirements and the -- specifically the
14 restrictions on creating nuisance and odor conditions
15 that were applied by the DEC inspectors and air
16 pollution control experts.

17 Q. So in reviewing the regulatory record, did you
18 generally grant deference to discretionary
19 determinations of the Vermont regulators that were on
20 the scene during the relevant time period?

21 A. I wouldn't describe them as discretionary, but
22 yes, I did give significant credence to their -- their
23 determinations. I mean, they were -- just to clarify,
24 if I might, the word "discretionary" might suggest that
25 it was somehow arbitrary, and that's not my experience

1 of the way that they applied the -- the criteria to the
2 complaints and their own observations.

3 Q. And to be clear, I don't mean to suggest that
4 the terms are synonymous. You can have discretion
5 which you can apply arbitrarily or you can apply it
6 nonarbitrarily. So when I say "discretion," I mean it
7 in a neutral sense.

8 A. I understand.

9 Q. Is there any other component of your
10 methodology that we have not addressed?

11 A. Well, the other -- there are pieces of Mr.
12 Flechas' opinions and reports that describe the broad
13 public policy and legal framework around air pollution
14 control and the regulation of hazardous air pollutants
15 that I disagree with that come not from the record but
16 from my own experience as someone who's worked for many
17 years in the -- the implementation of -- of
18 environmental law and policy as applied to pollutants
19 and hazardous pollution in particular.

20 Q. But with respect to whether a violation has or
21 hasn't occurred, is your methodology essentially the
22 steps that we've discussed already, or is there some
23 additional component that we have not discussed?

24 A. No. That's -- that's correct. We've -- we've
25 discussed my methodology.

1 Q. Did you apply any engineering principles in
2 the course of reaching your opinions in this case?

3 A. Not to form an independent opinion. I have to
4 say it's been helpful that I have had some engineering
5 experience in terms of understanding the -- the
6 terminology and language, but I relied entirely on
7 people who have expertise in those areas.

8 Q. And specifically the -- the regulatory staff
9 during the time period that ChemFab and Saint-Gobain
10 were operating in Vermont?

11 A. Correct. As well as the information provided
12 by Dr. Hopke.

13 Q. Okay. Turning now to some of your other
14 opinions beginning at page 7. And heading 3 states
15 "Air emissions of APFO were a regulatory concern by
16 1997." Do you see that?

17 A. I do.

18 Q. What was your methodology in reaching that
19 opinion?

20 A. That was based on my review of the record, of
21 information that Dr. Hopke had compiled and that I
22 reviewed, as well as my own knowledge of the evolution
23 of regulatory responses to PFOA.

24 Q. What is your understanding of regulatory
25 responses to PFOA?

1 A. That's a long -- long answer. I'll give the
2 highlights, and you can tell me where to spend more
3 time. But there were -- from the time that PFOA first
4 began to be used anywhere through really the -- the --
5 I mean, there were some exchanges, I understand, that
6 happened, like, down in West Virginia and some parts of
7 the country around PFOA and DuPont that I can't recall
8 specifically, but I know there were at least some
9 exchanges in the '70s or maybe the '80s, but the first
10 time that there was a serious public conversation about
11 PFOA and the regulatory process was in the -- the late
12 '90s.

13 There was -- there were clues in Vermont when
14 you look at the record about the -- the risks
15 associated with the emissions at the North Bennington
16 ChemFab plant that should have given rise both to the
17 State and to ChemFab that more attention should have
18 been paid to it. But really the -- the most
19 significant public discussion and discourse around a
20 regulatory response specific to PFOA was in the late
21 '90s and into the early 2000s as publicity around the
22 litigation involving the West Virginia case and then
23 the class-action suit filed by Rob Bilott as well as
24 the exchanges with EPA began to emerge onto the scene
25 and then EPA and the states began to have a greater

1 awareness of the risks.

2 Q. And to be clear, your understanding of this
3 regulatory history is something that you developed
4 after your time with Vermont DEC; is that correct?

5 A. That's correct.

6 Q. So I believe you testified that there were
7 clues in Vermont apparent in the record that should
8 have given rise both to the State and to ChemFab that
9 more attention should have been paid to PFOA. Is -- is
10 that your testimony?

11 A. Yes.

12 Q. So is it your testimony that the State was on
13 notice of PFOA issues in the late 1990s that it should
14 have brought more attention to bear on?

15 A. And ChemFab. Both, yes.

16 Q. But also the State?

17 A. Yes.

18 Q. Okay. If we could turn to Mr. -- well, strike
19 that. I need to show you a different exhibit.

20 (Deposition Exhibit No. 5 was
21 marked for identification.)

22 BY MR. WEINRAUB:

23 Q. So Exhibit 5 is Dr. Hopke's rebuttal report
24 dated August 1, 2018. Am I correct that you have not
25 seen this document before?

1 A. That is correct.

2 Q. And you're welcome to read as much of it as
3 you like, but my -- my question will focus on the final
4 paragraph on page 4. And so there's a heading number
5 5, "Rebuttal of opinions of Felix W. Flechas, P.E.,"
6 and towards the end of that paragraph, Dr. Hopke
7 states, "I will note that Mr. Flechas offered no
8 scientific opinions about whether ChemFab/Saint-Gobain
9 knew or should have known about its emissions of PFOA
10 or whether the company failed to utilize available
11 control technologies for control of its emissions of
12 PFOA."

13 Now, recognizing that you have not seen
14 this -- this report before, I'd like to ask you about
15 the use of the term "scientific opinions." This will
16 sound more flip than I mean it to, but essentially my
17 question is, Is there any such thing as a scientific
18 opinion about whether a company knew or should have
19 known something?

20 MS. JOSELSON: Object to the form.

21 A. I mean, that seems a matter of grammar and
22 semantics. I -- I would note that it may be that he
23 meant that there was -- you know, he wasn't going
24 through to do kind of a forensic analysis of what
25 ChemFab knew and when they knew it. I'll note, though,

1 for what it's worth, since we're on this topic, that I
2 will offer a nonscientific opinion but one grounded
3 in the -- the record and the facts that the -- the
4 combination of the complaints, the nature of the
5 citizen complaints, the nature of the information known
6 back as early as the early '80s about Chem- -- by
7 ChemFab about the impacts of the exposure to their
8 process that were having on their employees, that there
9 were substantial questions about the public health
10 impacts of the chemicals they were using, and this to
11 me suggests that there was a failure to fulfill their
12 responsibility to really figure out what those -- the
13 causes of those problems were and to communicate those
14 to the State of Vermont.

15 MR. WEINRAUB: I'm going to move to strike
16 that as nonresponsive.

17 Q. And I won't ask you to speak for Dr. Hopke
18 because that would not be fair, but let me just ask
19 you, in your experience is -- is a "should have known"
20 standard part of the reasonableness standard of conduct
21 in a tort case?

22 MS. JOELSON: Object to the form.

23 A. I mean, tort law depends on the -- the
24 jurisdiction, and how reasonableness is defined is
25 often defined by reference to specific case law, but as

1 a general matter, I would agree with that statement.

2 Q. Does the phrase "should have known" appear
3 anywhere in the Vermont Air Pollution Control
4 Regulations?

5 A. I don't know.

6 Q. During your time with Vermont DEC, did you
7 ever make regulatory determinations regarding whether a
8 plant owner/operator knew or should have known any
9 particular fact?

10 A. Yes.

11 Q. And could you describe that experience.

12 A. It's frequently the case that people in the
13 regulated community, whether it's a company or
14 developer, are taking actions on the landscape that
15 have a negative impact on the environment or the public
16 health, and in pursuing an enforcement case, in terms
17 of determining whether to pursue it; what level of
18 gravity the penalty to pursue, whether to pursue it as
19 a civil, administrative, or criminal; considerations of
20 what they should have anticipated to be the results as
21 a consequence of their actions were very often a
22 consideration.

23 Q. And so "knew or should have known" is -- is
24 something that you've applied in the enforcement
25 context, correct?

1 A. Correct. Although that -- that relates in
2 some ways to the questions of whether or not someone
3 should have applied for a permit or should have
4 identified a particular chemical as a potential
5 contaminant of concern that should be investigated or
6 considered for an emissions limitation.

7 Q. So whether a permit violation occurred depends
8 in part on whether the company knew or should have
9 known something; is that your testimony?

10 A. It -- it can, yes. I mean, I appreciate that
11 from the perspective of the regulated community they
12 frequently turn as a default, and should, to the list
13 of identified chemicals that are regulated, but the
14 statutes as -- in general and in the case of the Clean
15 Air Act and in the state air pollution laws also note
16 that where there's information about public health or
17 environmental risks of other chemicals, those are --
18 are subject to regulation, and companies are on notice
19 of that and have been for many decades.

20 Q. And is there a particular regulation that
21 you're referencing in that testimony?

22 A. There's -- each of the regulations that I can
23 think of that involve toxics provisions, whether it's
24 drinking water, surface water, hazardous waste, or air,
25 all include definitions of hazardous or toxic chemicals

1 that include open-ended language that allow the
2 regulators, the agency or DEC commissioner, and the
3 regulated community to identify chemicals that are not
4 listed but pose a threat to public health or the
5 environment.

6 Q. And so in the air context, are you referring
7 to the regulatory definition of a hazardous air
8 contaminant?

9 A. That would be a good example of one, yes.

10 Q. Are there any other examples in the air
11 context of situations where a regulated source needs to
12 go beyond specific lists of -- of chemicals of concern?

13 A. Although it's seldom used, there actually is
14 the discretion of the State and EPA to expand the list
15 of criteria pollutants as well.

16 Q. But is there ever a situation where a source
17 is required to take any action with respect to
18 pollutants that are not listed as criteria pollutants
19 in connection with Ambient Air Quality Standards?

20 A. Beyond the ones -- beyond the hazardous air
21 pollutant one, not that I can recall specifically.
22 There may be others. I just am not familiar with them.

23 Q. Do you recall any particular entities or
24 violations in which you personally made a regulatory
25 finding regarding what a company knew or should have

1 known?

2 A. That goes back over most of my career, and so
3 I can't recall a specific example. The time --
4 certainly when I was in the State of Vermont as the DEC
5 commissioner, I did not make those determinations
6 personally. Those determinations were made typically
7 by my inspectors and enforcement staff or their direct
8 and immediate supervisors. But there have been times
9 over the course of my career where I've been on the
10 front line of either performing inspections or working
11 with inspectors as an attorney in which we've made
12 those determinations.

13 Q. And what would those determinations look like?
14 Would they be findings of fact, would they be arguments
15 in a legal brief, or something else?

16 A. They would be primarily findings of fact, but
17 findings of fact that are oriented around the criteria
18 and also what was known in the industry, what specific
19 facts the regulated entity had before them, looking at
20 monitoring information, assessments by their own
21 experts, correspondence with regulators.

22 Q. Have you ever made findings of fact of that
23 nature based solely on historical records without
24 speaking to any of the people with contemporaneous
25 knowledge of those facts?

1 A. Certainly I've used documents that were
2 drafted by or developed by people that were not
3 available to me to speak to because they were -- those
4 people were no longer with those organizations or
5 had -- had moved on or -- depending on how long ago
6 they were. But to the implication of the question,
7 that it's always better to speak in person to the
8 people involved making those determinations, I would
9 agree with that implication.

10 Q. Are you familiar with any legal authorities
11 holding that a corporation's knowledge or intent or
12 other states of mind are not proper subjects for expert
13 testimony?

14 A. No.

15 Q. You've never heard of any such authorities
16 during your time as a lawyer?

17 A. No.

18 Q. Or during your time as a law school professor?

19 A. No. I'm -- I'm certainly familiar with the
20 Daubert standard and the nature of expert opinions.
21 What I'm struggling with is the nature of the use of
22 the word "opinion." There are -- when determining
23 states of mind, there are, of course -- when you have
24 the opportunity for the Court or the tribunal or the
25 person making the opinion to speak to that person, to

1 observe their demeanor, those are all valuable, but
2 it's also important to look at documentation,
3 documents, testimony from others, correspondence that
4 happened at the same time, to be able to determine what
5 the nature is of what the company knew and at what
6 levels they knew it, what level of staff or leadership.

7 Q. And you're not familiar with any authority
8 discussing whether it's appropriate for experts to
9 review the documents and give opinions regarding a
10 company's knowledge or other state of mind?

11 MS. JOSELSON: Object to the form.

12 A. It seems unusual to -- to have someone who's
13 serving as an expert that's evaluating the nature of
14 the regulatory response by regulatory agency.
15 Typically it's not so much a matter of an expert
16 witness that a government agency relies on to make
17 determinations of violations or what level of
18 enforcement to take. That's usually made by the
19 agencies themselves.

20 But I've been called into this case in
21 response to assertions by Mr. Flechas that the State
22 somehow was -- was okay with or even affirmatively in
23 support of or approving the actions that ChemFab took
24 that led to the emission of PFOA, and so that's -- I
25 just -- frankly, this is the first time I've ever

1 experienced an expert being involved in a case like
2 this, but that doesn't mean it hasn't happened before.
3 It's just not something I'm familiar with.

4 Q. And -- and to be clear -- and I'm not sure my
5 questions were clear. This is just to clarify that.
6 What I'm really asking is your understanding of an
7 expert's role in testifying in a lawsuit about what a
8 company knew or didn't know or should have known. You
9 know, as a former law school dean, former law school
10 professor, and -- and an attorney, are you familiar
11 with any legal authorities talking about whether it's
12 appropriate for an expert witness to testify in a court
13 case about what a company knew or should have known?

14 MS. JOELSON: Objection.

15 A. No, I'm not.

16 Q. Do you view that to be a proper subject of
17 expert testimony?

18 A. It's an interesting question in that Mr.
19 Flechas makes a set of assertions in his testimony as
20 to essentially what he asserts to be the regulatory
21 state of mind of the State of Vermont officials and in
22 a way that is inconsistent with my experience and work
23 as a regulator and within state agencies, and it's that
24 set of assertions that I'm engaging with to respond to,
25 and -- and that does seem to me inappropriate.

1 To the extent that Mr. Flechas is -- is
2 authorized to provide an expert opinion on the state
3 of -- the state of the relationship between the State
4 of Vermont and ChemFab, to present a different
5 perspective from the perspective of someone who's
6 worked in the State of Vermont on the Clean Air Act
7 issues seems an appropriate set of information to be
8 included before the tribunal.

9 Q. And you understand that Mr. Flechas in turn
10 was responding to opinions by Dr. Hopke regarding the
11 knowledge and state of mind of ChemFab and
12 Saint-Gobain, correct?

13 MS. JOSELSON: Object to the form.

14 A. I'm not sure the -- the reasons for -- for Mr.
15 Flechas' testimony.

16 Q. Could you turn with me to Exhibit 2, which is
17 Dr. Hopke's merits report. And at the bottom of page
18 6, heading number 5 states, "ChemFab/Saint-Gobain knew
19 or should have known it was emitting PFOA in North
20 Bennington." Do you see that?

21 A. Yes.

22 Q. Is that one of the opinions of Dr. Hopke's
23 that you adopted for purposes of this case?

24 A. I'm not sure if "adopt" is the right word, but
25 I agree with -- with it in the sense like I'm not

1 accepting his assertions because of his expertise. I
2 agree with his assertions based on my own review of the
3 same record and documents.

4 Q. And do you believe that it requires a
5 regulatory expert to read documents and draw inferences
6 regarding what a company knew or didn't know?

7 MS. JOSELSON: Object to the form.

8 A. It's -- it is somewhat of a puzzle that --
9 that this set of issues are being presented as -- as a
10 matter of expert testimony in that I assume the
11 tribunal will look at the same facts and form its own
12 opinion, but I do think it's -- it's relevant and
13 useful that someone with Dr. Hopke's background and
14 experience of looking through technical documents can
15 compile them and describe and explain the -- the
16 logical conclusions that would flow from those
17 documents, as I also think it's valuable for someone
18 like me as a lawyer to be able to provide to the
19 process an opinion on what these documents suggest in
20 terms of how -- how an agency -- how a company -- a
21 regulated company and an agency should work through
22 emerging knowledge about contaminants of concern such
23 as PFOA.

24 Q. I believe you testified that you're not aware
25 that Dr. Hopke had any prior regulatory experience of

1 his own. Correct?

2 A. Yeah. I'm unaware if he has had any such
3 experience.

4 Q. And you're also aware -- you also testified
5 that you are not aware how Dr. Hopke selected the
6 documents that he compiled and based his opinions on,
7 correct?

8 A. Correct.

9 Q. Now, you have practiced law on behalf of
10 clients in the past, correct?

11 A. Yes.

12 Q. And have you drafted and submitted legal
13 briefs on behalf of your clients?

14 A. Yes.

15 Q. Have you given oral arguments to courts on
16 behalf of your clients?

17 A. Yes.

18 Q. Have you tried cases?

19 A. Yes.

20 Q. Have you delivered closing arguments?

21 A. Yes.

22 Q. And in doing so, you were advocating on behalf
23 of your clients, correct?

24 A. Correct.

25 Q. Now, in this case you've been proffered as an

1 expert witness and not as an advocate, right?

2 A. Yes.

3 Q. So in preparing your report, did you make any
4 conscious effort to avoid writing in the style of an
5 advocate and instead write in a more objective style?

6 A. Yes, I did.

7 Q. How so? Let me -- let me put a little meat on
8 that -- on that bone. How did your writing process
9 here differ from how you might draft a legal brief on
10 behalf of one of your clients?

11 MS. JOSELSON: Object to the form.

12 A. The -- for me the writing process and the
13 process of forming an opinion and the substance are all
14 intersected, so it's less -- my response is less in
15 response to the question of how I write and more about
16 how do I form opinions, and in the role of a
17 commissioner, for instance, at a department, the role I
18 played at Vermont DEC and as a state official, which
19 I've done over the years, I often -- always am trying
20 to take in the information that's available without
21 judging it based on trying to get to a particular
22 outcome but more in terms of trying to assess what
23 is -- what is an appropriate and neutral interpretation
24 of that information, and so that was the process I was
25 going through.

1 I -- I read Mr. Flechas' report carefully and
2 the documents he relied on; I looked through the
3 information that Dr. Hopke had carefully compiled,
4 which I found to be more complete; and -- and then
5 formed my own opinion from that.

6 Q. If I could refer you back to your report,
7 which is Exhibit 1, and ask you to turn to page 4.

8 MS. JOELSON: Exhibit 1, page 4?

9 MR. WEINRAUB: Correct.

10 A. Yes. I see.

11 Q. And looking at the top paragraph of heading
12 number 2, about five lines from the top, there's a
13 sentence that reads, "Furthermore, as can be seen in
14 this case, it has been state policy to attempt to
15 secure compliance through cooperation with industry
16 whenever possible. Unfortunately, ChemFab/Saint-Gobain
17 took advantage of this policy of cooperation to
18 continue polluting for many years until it found it
19 economically more attractive to move its operations to
20 New Hampshire where air pollution controls were not
21 required at the time." Do you see that?

22 A. I do.

23 Q. The phrase "took advantage of this policy," is
24 that a regulatory term of art?

25 A. No.

1 Q. What are the criteria for determining whether
2 a company is taking advantage of versus working
3 cooperatively with regulators?

4 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20 Q. Is that a personal opinion or is that an
21 expert opinion, Mr. Mears?

22 A. It's an opinion born of my experience working
23 with the regulated community on pollution cases dating
24 back to the -- 1987, when I first began doing
25 enforcement work for the State of Texas.

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[REDACTED]

Q. And throughout that period, you're aware that there were ongoing communications between ChemFab and Vermont DEC to address how best to respond to odor issues, correct?

A. Yes.

MS. JOSELSON: Object to the form.

THE WITNESS: Sorry.

A. Yes.

Q. During the time in North Bennington, was there

1 ever a fine imposed because of odor issues?

2 A. No.

3 Q. You testified earlier that you deferred
4 substantially to the judgment of regulators on the
5 ground that were making determinations within their
6 discretion during the relevant time period. Correct?

7 A. Correct.

8 Q. Do you disagree with the lack of formal
9 enforcement proceedings against ChemFab or Saint-Gobain
10 during that time period?

11 MS. JOSELSON: Object to the form.

12 But you can answer.

13 A. With respect to the issue of odors, I do not
14 challenge the -- the department's decision not to bring
15 an enforcement action or hold -- to assess fines
16 specifically for that set of violations, and I can
17 explain if helpful.

18 Q. So you are not offering an opinion that
19 ChemFab or Saint-Gobain should have been fined or
20 penalized during that time period for not doing more to
21 address odor issues, correct?

22 A. No. I'm suggesting that I don't second-guess
23 the department's decision to not assess penalties for
24 the odor violations in and of themselves. Odor and
25 nuisance conditions are very difficult to prove, and

1 when a defendant or a violator in this case challenges
2 them, it can be very expensive, and the outcomes are
3 uncertain. But the nature of those odor complaints,
4 the persistent nature of them, combined with the fact
5 that the company did not have and hadn't sought the
6 necessary regulatory approvals for -- for permits for
7 me raised serious questions of whether the State should
8 have taken stronger enforcement actions, not
9 necessarily -- I -- I don't offer an opinion with
10 regard to penalty specifically, but it seems clear to
11 me that there should have been stronger injunctive
12 relief and orders in terms of further investigation of
13 alternatives and of treatment systems and ways to
14 mitigate or eliminate the odor and nuisance complaints.

15 Q. So in your opinion, the State should have --
16 should have taken stronger enforcement actions during
17 the time that ChemFab and Saint-Gobain operated in
18 Vermont?

19 A. Yes.

20 Q. But the officials in charge at that time did
21 not share that opinion, apparently; would you agree?

22 MS. JOELSON: Object to the form.

23 A. I don't know who agreed and didn't agree
24 within the -- the Agency of Natural Resource and the
25 Department of Environmental Conservation. There's no

1 clear record that I could find of what was communicated
2 between the -- the head of the air pollution control
3 program and the DEC commissioner and the ANR secretary
4 and the Governor's Office. So, you know, state
5 government and a department like that is not
6 monolithic, so I'm not sure. There are some
7 indications from some of the inspections; for instance,
8 from Chris Jones, that suggest -- and a letter from
9 Dick Valentinetti that suggest that they were
10 considering particularly in the late 1990s taking a
11 stronger action.

12 Q. You testified that odor and -- and nuisance
13 can be very difficult to prove, right?

14 A. Correct.

15 Q. And so the fact that an odor complaint or a
16 nuisance complaint is made does not mean that an odor
17 or nuisance violation actually occurred, correct?

18 A. No. It's more -- the point I was trying to
19 make is that it can be very difficult to prove to a
20 tribunal, to a judge, that an odor or nuisance
21 complaint has occurred because it relies on the -- on
22 the judgment, even expert informed judgment, of
23 inspectors, and it's relatively easy for a defendant or
24 an alleged violator in those circumstances to -- to
25 challenge that. So frequently for very practical

1 reasons state regulatory agencies do not pursue
2 nuisance or odor violations in and of themselves. They
3 typically use those as indicators to look for other --
4 other emissions or problems at the site and when at all
5 possible try, as they did in this case, to work
6 collaboratively with the company to find ways to
7 address those.

8 Q. Do you have any way of knowing whether formal
9 enforcement proceedings charging ChemFab or
10 Saint-Gobain with odor or nuisance violations would
11 have met the standard of proof to establish such
12 violations in a court?

13 MS. JOELSON: Object to the form.

14 A. I have some information. As I noted earlier,
15 the fact that there were frequent complaints by
16 multiple different complainants that were corroborated
17 by trained inspectors from the State are strong
18 indication to me that there were in fact violations
19 that could have been brought.

20 Q. And had violations been brought, ChemFab and
21 Saint-Gobain would have had the right to challenge that
22 evidence and attempt to show that no such violation
23 actually occurred, right?

24 A. Correct.

25 Q. And because there was no enforcement

1 proceeding, you have no way of knowing which viewpoint
2 would have prevailed in any such proceeding, correct?

3 A. I don't know that I would agree that I would
4 have no way of knowing, but it would certainly be very
5 difficult to predict.

6 Q. So when you say that violations occurred,
7 you're not necessarily opining that violations could
8 have been established had an enforcement proceeding
9 been brought at the time, right?

10 MS. JOELSON: Object.

11 A. Yes. No. As I -- as I explained earlier,
12 it's -- it's very hard to predict how a tribunal will
13 rule on odor and nuisance complaints.

14 Q. So you're giving a personal opinion that in
15 your view violations occurred, but you don't know
16 whether that opinion would have prevailed if
17 challenged?

18 MS. JOELSON: Objection.

19 A. In my opinion, but as I noted, informed by the
20 inspections and inspection reports by DEC inspectors
21 who were on the scene and at the site and observed
22 the -- the smoke and the odors and the other impacts.

23 Q. Okay.

24 MR. WEINRAUB: I'm at a transition point.

25 Happy to move on, but if you'd like to take a -- take a

1 break, that's fine.

2 MS. JOELSON: That would be great. Thanks.

3 MR. WEINRAUB: Sure. Thank you.

4 THE VIDEOGRAPHER: Going off the record at
5 11:05.

6 (A recess was taken.)

7 THE VIDEOGRAPHER: We are back on the record
8 at 11:20.

9 BY MR. WEINRAUB:

10 Q. Okay, Mr. Mears. Let's turn to page 3 of your
11 report. And under heading 1, the second paragraph
12 down, there's a discussion of the two types of permits
13 required by the Clean Air Act. Do you see that?

14 A. I do.

15 Q. And the third sentence in that paragraph
16 states, "Operating permits are required under Title V
17 of the CAA, as amended in 1990, to operate air
18 contaminant sources." Do you see that?

19 A. I do.

20 Q. Then down in the next paragraph, towards the
21 end, there's a sentence that reads, "ChemFab did not
22 apply for a Title V operating permit until April 26,
23 1996." And the paragraph ends, "The operating permit
24 was never granted by DEC." Do you see that language?

25 A. I do.

1 Q. Is it your opinion that ChemFab violated the
2 operating permit requirement under Clean Air Act Title
3 V?

4 A. No.

5 Q. And Dr. Hopke didn't identify any such
6 violation of the operating permit requirements,
7 correct?

8 A. Correct.

9 Q. In fact, Dr. Hopke's report does not cite the
10 operating permit requirement under the Clean Air Act or
11 Vermont's rules, does it?

12 A. He does cite Vermont's rules, but he does not
13 reference a violation of the operating permit that was
14 never issued.

15 Q. So when you state that operating permits were
16 required under the Clean Air Act as amended in 1990 and
17 that ChemFab applied for an operating permit in April
18 of 1996, you're not suggesting that ChemFab's
19 application was untimely, are you?

20 A. I am suggesting that it's not at all clear
21 that they had an operating permit authorizing them to
22 operate their various processing facilities even though
23 there was a clear requirement in the statute, state law
24 and federal law, that required operating permits for
25 sources of pollution.

1 Q. So just so I'm clear, is it your opinion that
2 ChemFab violated the requirement to have an operating
3 permit?

4 A. No. As I said earlier, that's not my
5 contention, although it is of serious question of
6 whether or not they should have had one. But I offer
7 this primarily in response to Mr. Flechas' suggestion
8 that ChemFab was operating in full compliance with all
9 of the Clean Air Act requirements of the State of
10 Vermont and the Clean Air Act.

11 Q. We'll talk about Mr. Flechas' opinions in a
12 moment, but for now I want to make sure that I
13 understand your opinions. You say that ChemFab applied
14 for an operating permit on April 26, 1996. Is it your
15 opinion that that application was timely, or do you
16 believe that application occurred after ChemFab's
17 deadline to apply for a permit?

18 A. I don't know enough. There's not enough
19 information for me to determine whether they were --
20 when they were required to apply for it, an operating
21 permit, or whether or not DEC would have required one
22 had they applied --

23 Q. What information --

24 A. -- but it's very clear to me that if the
25 requirement -- if they were required to apply for an

1 operating permit, they should have had one -- they
2 should have applied much sooner than April of 1996 in
3 response to a requirement that came into effect in the
4 early 1990s.

5 Q. What is your understanding of when companies
6 were required to apply for operating permits under
7 Title V of the Clean Air Act?

8 A. It -- my understanding is that it varied
9 depending on the state and when the states adopted
10 those requirements into their state implementation plan
11 and updated their regulations, but typically it was
12 within a year or two of 1990.

13 MR. WEINRAUB: Mark this, please. This will
14 be Exhibit 6.

15 (Deposition Exhibit No. 6 was
16 marked for identification.)

17 BY MR. WEINRAUB:

18 Q. Bear with me for a moment, please.

19 Okay. Apologies for the delay. I'm a
20 paperless guy trying to make my way in a world full of
21 paper.

22 If you'll turn with me to the page that's --
23 that has page number 32250 in the upper left. And then
24 about halfway down the page, there's a paragraph that
25 reads, "Title V establishes timeframes for developing

1 and implementing the State permit programs. Within 3
2 years of enactment (i.e., no later than November 15,
3 1993), States must submit proposed permit programs to
4 EPA for approval. The EPA must act to approve or
5 disapprove a State program within 1 year of submittal
6 by the State to EPA." Do you see that?

7 A. I do.

8 Q. So Vermont had until November of 1993 to
9 submit its proposed operating permit program to EPA,
10 correct?

11 A. Correct.

12 Q. And -- and whenever Vermont submitted its
13 program, EPA had one year to approve or disapprove the
14 program, correct?

15 A. Correct.

16 Q. Do you know when Vermont submitted its
17 operating permit program to EPA?

18 A. I do not.

19 MR. WEINRAUB: Let's mark this one, please.

20 This will be Exhibit 7.

21 (Deposition Exhibit No. 7 was
22 marked for identification.)

23 BY MR. WEINRAUB:

24 Q. On the first page of Exhibit 7, if you'll read
25 with me, in the bottom right-hand corner, there's a

1 heading, 1, that reads "Title V Program Support
2 Materials." Under that it states, "Vermont's title V
3 program was submitted by the State on April 28, 1995.
4 The submittal was found to be administratively complete
5 on June 12, 1995." Do you see that language?

6 A. I do.

7 Q. Do you have any reason to dispute that
8 Vermont --

9 A. I --

10 Q. -- that Vermont submitted its program to EPA
11 in 1995?

12 A. No.

13 Q. Do you know when EPA granted interim approval
14 of Vermont's operating permit program?

15 A. I do not.

16 Q. Do you have any reason to dispute that it
17 granted such approval in October of 1996?

18 A. No, I do not.

19 Q. Do you have any -- any reason to dispute that
20 under CAA Title V ChemFab had until October 1997 to
21 apply for an operating permit program? And I'm not
22 asking you to agree with me. Just asking if you have
23 any reason to dispute that that's --

24 A. I have no reason to dispute that.

25 Q. Do you know what the date was under -- under

1 the state program by which ChemFab needed to apply for
2 an operating permit?

3 A. No, I do not.

4 Q. So is it fair to say that as you sit here
5 today you don't have any basis to opine that ChemFab's
6 application for an operating permit was untimely under
7 the Clean Air Act?

8 A. No. And I appreciate the clarification of the
9 review of the Federal Register, which makes it clear
10 that they were probably not.

11 Q. Now, you state -- well, let's turn back to
12 that same language in your report at page 3. And the
13 third paragraph under heading 1 is where we've been
14 reading from. The final sentence states, "The
15 operating permit was never granted by DEC." Do you see
16 that?

17 A. I do.

18 Q. To your knowledge, did DEC ever take any final
19 application -- strike that.

20 To your knowledge, did DEC ever take any final
21 action on the application?

22 A. As far as I'm aware, they did not.

23 Q. And is it your view that ChemFab violated the
24 Title V operating permit requirement by continuing to
25 operate while its application was pending before DEC?

1 A. Not on that basis. Not on the basis that you
2 just described, no.

3 Q. Was there some other violation of the
4 operating permit requirement that you have in mind?

5 A. There was no operating permit for them to have
6 violated.

7 Q. Was there any other basis on which you would
8 opine that they violated the operating permit rules?

9 A. I don't know the extent to which the -- those
10 rules described the nature of -- of operations, what
11 substantive obligations need to be met during the
12 pendency of a decision on a permit, but in terms of the
13 procedure of a failure to apply for the permit, no, I
14 would assume that there was -- I have no reason to
15 think that there was a violation of that particular
16 procedural requirement.

17 Q. Do you think your report on page 3 is
18 sufficiently clear in informing the Court that you are
19 not asserting a violation of the operating permit
20 rules?

21 MS. JOSELSON: Object to the form.

22 A. The main point that I was trying to make and
23 that I think is clear enough is that the assertion by
24 Mr. Flechas that ChemFab was operating under -- with
25 the approval of -- of a permit issued by the department

1 was incorrect. That was the main point that I was
2 trying to make.

3 Q. But in -- and again, we'll turn to Mr.
4 Flechas' language in a moment, but when your report
5 states that there was a requirement to have an
6 operating permit under the 1990 amendments and that
7 ChemFab didn't apply until April 1996 and that the
8 permit was never granted, do you think it would have
9 been helpful to inform the Court of what the applicable
10 deadlines were and of whether it was appropriate for
11 ChemFab to continue operating while its application was
12 pending?

13 MS. JOELSON: Objection to the form.

14 A. It might have been helpful, but that was not
15 the point of my testimony. My point of my testimony,
16 as I've indicated, was to respond to Mr. Flechas'
17 assertion that they were operating in compliance with
18 an operating permit or with all of -- you know, permit
19 obligations that were required, and it's not at all
20 clear to me that they were.

21 Q. Without the benefit of the Federal Register
22 provisions that we've just walked through, do you think
23 a court reading through page 3 would have come away
24 with the impression that you were suggesting a
25 violation of the operating permit rules?

1 MS. JOSELSON: Objection to the form.

2 A. I think it suggests that there's a question
3 about what regulatory status they had and what
4 approvals they were operating under.

5 Q. But at present there is no question, correct?
6 There's no question as -- in your mind as you sit here
7 as to whether the application was timely?

8 MS. JOSELSON: Object to the form.

9 A. No, I do not. At this point given the
10 information you just shared from the Federal Register,
11 I don't have any question that their application was
12 timely.

13 MR. WEINRAUB: So let's mark Mr. Flechas'
14 report as Exhibit 8.

15 (Deposition Exhibit No. 8 was
16 marked for identification.)

17 BY MR. WEINRAUB:

18 Q. And before turning to that, another moment
19 on -- on pages 3 and 4 of your report. On page 3,
20 third paragraph down, your report states, "On page 15
21 of his testimony, Mr. Flechas confuses the two types of
22 permits by erroneously describing the permit issued in
23 1990 by Vermont DEC as an operating permit." Do you
24 see that language?

25 A. I do.

1 Q. And then on the next page, page 4 at the very
2 top, just the introductory phrase states, "In addition
3 to confusing the nature and extent of ChemFab's permit
4 authorizations," and the sentence continues. Do you
5 see that language?

6 A. I do, yes.

7 Q. So let's turn now to Mr. Flechas' report
8 marked as Exhibit 8 and specifically to page 15. And
9 in the second complete paragraph, the final sentence of
10 the paragraph states, "ChemFab had an operating permit
11 well before this date in 1990." Do you see that?

12 A. I do.

13 Q. And is that the -- the sentence that you
14 believe misstates the two types -- confuses the two
15 types of permits?

16 A. Yes.

17 Q. Now, in the preceding sentences in that same
18 paragraph, would you agree that Mr. Flechas clearly
19 distinguishes between "a permit for construction" and
20 "operating permits"?

21 A. Yes.

22 Q. And in the parenthetical that follows the
23 statement that -- that you were critical of, would you
24 agree that Mr. Flechas accurately describes the 1990
25 permit as a permit to construct?

1 A. I'm sorry. I -- I lost -- I must have lost
2 the --

3 Q. Yeah.

4 A. -- reference.

5 Q. That's my fault. So I'm at the very end of
6 that same paragraph, and there's a parenthetical. This
7 is the citation --

8 A. Oh, I see. "Letter" -- pardon.

9 Q. So -- and it cites to "Valintinetti, Letter
10 transmitting permit to Construct, 1990." You see that?

11 A. Yes. Yes.

12 MR. WEINRAUB: And let's mark Exhibit 9.

13 (Deposition Exhibit No. 9 was
14 marked for identification.)

15 BY MR. WEINRAUB:

16 Q. Do you recognize Exhibit 9 to be the 1990
17 construction permit?

18 A. I do.

19 Q. If you could turn with me to the last page of
20 the exhibit, which is DEC's cover letter to ChemFab
21 transmitting the permit. In the "Re" line, DEC
22 describes this permit as a permit "to Construct and
23 Operate a PTFE (Teflon) Coating Unit." Do you see
24 that?

25 A. I do.

1 Q. And then down in the body of the letter, do
2 you see -- and let's look at the second paragraph in
3 particular. In the body of the letter, do you see that
4 DEC is granting "approval to install and operate said
5 coating unit and associated equipment"?

6 A. I do.

7 Q. Is it fairly clear to you from that context
8 that what Mr. Flechas' statement was referring to is
9 that ChemFab had DEC's permission to operate the towers
10 in place at that time?

11 MS. JOSELSON: Object to the form.

12 A. That may have been his -- his intention, and
13 my -- the point of my report is that it's important in
14 this context to be clear, and there is confusion when
15 you refer -- when one refers to an operating permit,
16 because it has specific legal meaning in the context of
17 the Clean Air Act, and that's different -- when one
18 gets a preconstruction permit and it's approved, you
19 are entitled to operate the particular unit that has
20 been approved, you know, subject to the conditions of
21 that permit, so the term "operate" in its non-Clean Air
22 Act legal sense applies. So my point was to show that
23 there's a distinct legal meaning and it's important to
24 clarify that the entire facility did not have an
25 operating permit as that term is used under the Clean

1 Air Act.

2 Q. And so taking into account your -- your view
3 that Mr. Flechas could have worded his statement
4 differently, does it nevertheless appear from his
5 report that he knows the difference between a
6 construction permit and an operating permit?

7 MS. JOELSON: Object.

8 A. I can't be certain, but he certainly uses the
9 two terms distinctly, and so it's -- it's clear to me
10 he understands the basic structure, although he
11 blurred -- blurred that structure in his statement --
12 or opinion.

13 Q. Okay. Let's turn now to the subject of
14 construction permits and to your report at -- back to
15 page 3. And first I'd like to focus on the time period
16 prior to 1979.

17 Well, as a preface to that, the bottom
18 paragraph in your report on page 3, you state,
19 "Further, Vermont adopted rules in 1979 requiring
20 permits for construction, installation or modification
21 of any air contaminant source." Do you see that?

22 A. I do.

23 Q. And so now focusing on the period before 1979,
24 Vermont did not require construction permits before
25 1979, correct?

1 A. Correct.

2 Q. So is it fair to say there was no construction
3 permit requirement during the time that ChemFab
4 operated its facility in Bennington?

5 A. It's fair to say that in the sense that there
6 was no preconstruction review permit requirement.
7 There were other requirements in terms of notifying the
8 State and getting approvals.

9 Q. Okay. But in terms of just the requirement to
10 apply for and obtain a construction permit, there was
11 no such requirement during operations in Bennington?

12 A. I believe that to be true.

13 Q. Would you also agree that there was no
14 construction permit requirement during the time that
15 ChemFab initially relocated to its North Bennington
16 facility in 1978?

17 A. Again, with the caveat that there were other
18 requirements in place, but yes, in terms of the -- the
19 preconstruction review of the new source review
20 requirements of the Clean Air Act, which weren't
21 adopted until the 1977 Clean Air Act amendments and
22 implemented in the 1970 rules by the State of Vermont,
23 yes.

24 Q. And let's -- let's talk about those other
25 requirements. You state that despite the lack of a

1 construction permit requirement prior to 1979, "such
2 sources were not exempted from regulation." Correct?

3 A. Correct.

4 Q. Do you think that Mr. Flechas claimed
5 otherwise in his report?

6 A. Just off the top of my head, I can't recall
7 the specific statements that Mr. Flechas said with
8 regard to the pre-1979 compliance, but just sitting
9 here recalling, the impression I came away with from
10 his report was the suggestion that ChemFab had always
11 been in compliance with all the requirements of the
12 act.

13 Q. Okay. But you don't recall Mr. Flechas
14 opining that -- that the Bennington facility was
15 exempted from regulation prior to 1979, do you?

16 A. No, I don't recall that.

17 Q. All right. You also state that -- let me find
18 where we are on the page for a moment. So second to
19 last paragraph in your report on page 3, and at the end
20 of that paragraph, you state that "Section 5-408 of the
21 1972 rules required a person constructing new sources
22 to submit information to the Agency about the new
23 sources." Do you see that language?

24 A. I do.

25 Q. That's the only time your report mentioned

1 Section 5-408 of the 1978 rules, correct?

2 A. Correct. '72 rules.

3 Q. '72. Thank you. Have you opined that ChemFab
4 violated Section 5-408 of the 1972 rules?

5 A. I have not opined that, but it seems
6 self-evident from the fact that there was an assurance
7 of discontinuance issued by the State and then modified
8 in 1975 and then in -- modified in 1977.

9 Q. And do you believe that that assurance -- the
10 assurance of discontinuance related specifically to
11 violations of Section 5-408?

12 A. I don't recall without looking back at
13 those -- the 1975 and 1977 orders what the specific
14 allegations were, whether they cited 5-408 or not.

15 Q. Does your report identify any specific
16 information known to ChemFab in or prior to 1978 that
17 ChemFab was required to disclose pursuant to Section
18 5-408?

19 A. I'm sorry. Could you repeat the question?

20 Q. So in connection with Section 5 -- 5-408, that
21 section requires sources to submit information to the
22 agency about new sources, correct?

23 A. Correct.

24 Q. Does your report identify any specific
25 information that ChemFab was required to submit prior

1 to constructing new sources during the pre-1979 time
2 period that ChemFab did not submit?

3 A. No, it does not.

4 Q. So when stating that ChemFab was not exempt
5 from regulation and that Section 5-408 requires certain
6 disclosures, that's not a response to any opinion
7 offered by Mr. Flechas or Mr. Hopke, is it?

8 A. It's in response to the general assertions by
9 Mr. Flechas that the company always operated in full
10 compliance with the State's requirements and
11 authorization -- continuous authorization.

12 Q. But how does Section 5-408 play into that
13 response?

14 A. The fact that there was no preconstruction
15 permit requirement prior to 1979 doesn't mean that
16 there weren't obligations on sources of air pollution
17 to engage with the agency over whether or not they had
18 to apply for permits or at least share information.
19 That was the -- the point that I'm making.

20 Q. But as we've discussed, Mr. Flechas didn't
21 opine otherwise. He didn't opine that there was no
22 duty to submit information, did he?

23 MS. JOELSON: Objection.

24 A. Not specifically. Again, I was responding to
25 the general theme that runs through Mr. Flechas' report

1 that the company complied with all permitting
2 requirements from the outset.

3 Q. How does citing a provision that you don't
4 claim ChemFab violated have anything to do with your
5 analysis?

6 MS. JOELSON: Objection.

7 A. Because the -- it's -- I don't -- I simply
8 don't know what the exchange was from -- from ChemFab,
9 but there's no evidence that I saw or indicated in the
10 record that there was -- that the company was actively
11 submitting information about its new sources to the
12 agency except in response to the assurance of
13 discontinuance. So it relates in the sense of
14 responding to the assertions that the company operated
15 in full compliance and with the agreement of the -- the
16 State.

17 Q. So isn't it fair to say that that sentence
18 regarding Section 5-408 implies that there might have
19 been a violation that you have no basis to actually
20 assert occurred?

21 MS. JOELSON: Object.

22 A. No. No. I'm not trying to imply a violation.
23 I'm just noting that there were in fact requirements in
24 place, and if nothing else, the assurances of
25 discontinuance make clear that the company was not

1 sharing -- fully sharing information except in response
2 to an enforcement response from the State.

3 Q. How do you know they weren't sharing
4 information except in response to enforcement
5 proceedings?

6 A. Just by -- by virtue of -- I mean, your point
7 is well taken. I don't know for certain. But the --
8 there's a strong evidence of the failure to share
9 information with the State by the fact of the 1975
10 assurance of discontinuance.

11 Q. But you testified earlier that you don't know
12 whether the assurance of discontinuance had anything to
13 do with a violation of Section 5-408, correct?

14 A. Correct.

15 Q. So let's turn to the 1979 to 1990 time period.
16 You assert in general terms that ChemFab violated the
17 construction permit throughout that period, 1979 to
18 1990, with respect to six new coating towers built
19 during that time period, correct?

20 A. Can you repeat the question?

21 Q. Yeah. Let me find some language here. So
22 your report, page 3, bottom paragraph, and about three
23 sentences in, it states, "As discussed by Dr. Hopke,
24 ChemFab failed to comply with this construction permit
25 requirement from 1979 to 1990, when it finally

1 submitted a permit application for the 6 new coating
2 towers it had constructed at the North Bennington
3 facility during that time period." Do you see that
4 language?

5 A. Yes.

6 Q. What was the effective date of the 1979 air
7 pollution control rules?

8 A. I don't know off the top of my head.

9 Q. When was the first of those six new towers
10 constructed?

11 A. I don't recall off the top of my head.

12 Q. Do you recall whether it was in 1979?

13 A. I believe it was. Right when they first
14 moved.

15 Q. To your knowledge, when were the rest of those
16 six coating towers constructed?

17 A. My recollection without looking back through
18 the facts is that there was an additional three that
19 were constructed in the -- fairly soon after that and
20 then there was a couple more later, like in the late
21 '80s, early '90s. But I'd have to go back and look at
22 the -- the various documents.

23 I'm sorry. It must -- they applied in 1990.
24 It must have all been before 1990, but I recall some
25 were -- it seems to me that there was a flurry of lines

1 that were built in the early '80s and then some -- a
2 couple that were later on.

3 Q. Okay. Now, your report on page 4, in the
4 bottom paragraph, refers to a June 5, 1984, meeting
5 between DEC representatives and ChemFab management.

6 A. I see that.

7 Q. Bear with me for one sec. Okay. Apologies
8 for the dead air. I seem to be missing my exhibit, but
9 let me see if we can get by without it, but if not, we
10 can come back to it later.

11 So referring back to that June 1984 meeting,
12 do you recall generally whether that meeting included a
13 tour of ChemFab's facilities?

14 A. I don't recall.

15 Q. Okay. So let's come back to that later today,
16 maybe.

17 And let's turn to the 1990 permit that's been
18 previously marked.

19 MS. JOSELSON: Exhibit 9? Is that what it
20 was?

21 MR. WEINRAUB: I think so. Let me
22 double-check. Yes. Exhibit 9.

23 A. Oh, here it is.

24 Q. So this is the first construction permit
25 issued to ChemFab for the North Bennington facilities,

1 correct?

2 A. Yes.

3 Q. And on the front page of the permit -- well,
4 strike that.

5 Yeah. Front page of the permit, next to
6 paragraph 1, it states that ChemFab shall install and
7 operate the PTFE coating units. Do you see that?

8 A. I do.

9 Q. So even though some of these units presumably
10 had been installed prior to 1990, DEC is directing
11 ChemFab to install and operate those units, correct?

12 A. Correct.

13 Q. And DEC knew that those units had previously
14 been installed, right?

15 A. Correct.

16 Q. The permit conditions address -- well, strike
17 that.

18 The permit was granted subject to various
19 conditions; would you agree?

20 A. Agreed.

21 Q. And those conditions included the use of
22 catalytic abators?

23 A. Yes.

24 Q. Would you agree that the permit conditions
25 generally relate to control of odor and visible

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Q. So if we could turn to page 4 of your report and the second paragraph from the bottom. Make that the third paragraph from the bottom. It states at the end of that paragraph, "DEC's awareness of the operations did not excuse ChemFab from the permit requirement, and the failure to obtain construction permits was a serious violation that could have subjected ChemFab to substantial penalties." Do you see that?

A. Oh, yes, I see that. Yup.

Q. Now, Vermont DEC knew when the towers were constructed; wouldn't you agree?

A. Yes.

Q. And Vermont DEC knew when ChemFab filed its permit application in 1990, correct?

A. Yes.

Q. So this was not a situation where the regulatory agency's limited resources prevented it from learning the relevant facts in terms of the violation that you've asserted, correct?

A. I'm not understanding which violation you're suggesting that I asserted.

Q. You've asserted that ChemFab committed a serious violation of the permitting requirements by not

1 obtaining a construction permit until 1990 for the six
2 towers constructed over the prior ten years, right?

3 A. Correct.

4 Q. And Vermont DEC had all the information to
5 make that determination itself in terms of when the
6 towers were built and in terms of when the application
7 was filed, right?

8 A. Yes.

9 Q. If Vermont DEC considered the timing of
10 ChemFab's permit application to be a serious violation
11 that warranted substantial penalties, it had the
12 authority to impose those penalties, correct?

13 A. Yes.

14 Q. But DEC did not initiate any enforcement
15 proceedings, right?

16 MS. JOSELSON: Object to the form.

17 A. Specific to the context of these questions in
18 which you're suggest- --

19 Q. Yes.

20 A. -- talking about the operating permit in that
21 period of time in the '80s -- I'm sorry. I lost the --
22 my train of thought.

23 Q. No. That was a good clarification of my -- my
24 poor question, so let me start over.

25 With regard to the timing of -- of ChemFab's

1 permit application in 1990, given the fact that towers
2 had previously been built, Vermont DEC did not initiate
3 a notice of violation regarding those issues, correct?

4 A. Correct.

5 Q. And Vermont DEC did not impose any penalties
6 regarding those issues?

7 A. Correct.

8 Q. Instead, Vermont DEC issued the construction
9 permit for the six new towers?

10 A. Correct.

11 Q. And that was within Vermont DEC's discretion?

12 A. Yes.

13 Q. And Vermont DEC is charged with protecting
14 human health and the environment, correct?

15 A. Correct.

16 Q. Is that what you tried to do when you were DEC
17 commissioner?

18 A. Yes.

19 Q. Do you have any reason to think that DEC
20 officials were any less committed to that principle in
21 the 1979 to 1990 time period?

22 A. I have a couple of questions about what
23 occurred during that time frame at the department. One
24 is the degree to which they focused sufficient
25 resources on understanding the nature of the emissions

1 from the ChemFab plant in light of the nature of the
2 chemicals used, the impacts on employees of the
3 facility, and the near continuous set of complaints.

4 The second set of questions I have relate to
5 the engagement of elected officials in communicating to
6 the agency that they were concerned about the impacts
7 of the regulatory requirements on the company's
8 willingness to stay in Vermont.

9 So both of those questions for me call into
10 question why the State did not take a stronger
11 regulatory action.

12 Q. So do you believe that during this 1979 to
13 1990 time period Vermont DEC did not fulfill its
14 obligation to protect the health and the environment of
15 Vermont citizens?

16 A. In retrospect it's quite clear with 20/20
17 hindsight that had ChemFab proactively identified
18 and -- the nature of the emissions and proactively
19 applied for appropriate air pollution control equipment
20 and that had the State implemented that through its
21 permits and regulations, that a significant amount of
22 pollution could have been avoided that has resulted in
23 long-standing contamination in North Bennington that
24 I'm sure we all find regrettable.

25 Q. Okay. So putting 20/20 hindsight aside and

1 focusing only on the timing of the permit application
2 vis-à-vis the construction of the towers, is there any
3 indication that Vermont DEC considered that to be a
4 significant violation?

5 MS. JOSELSON: Object to the form.

6 A. I do recall some of the inspections raising
7 questions about the -- what -- whether the company
8 should be required to get permits, but there's not a
9 lot. I would agree that there's no clear assertions by
10 the State that there was a significant violation.

11 Q. And is there any indication in the regulatory
12 record that DEC officials believed that the
13 construction permit process was needed to provide them
14 access to information regarding ChemFab's facilities?

15 MS. JOSELSON: Object to the form.

16 A. Not in the record, no, that I saw.

17 Q. So turning now to the 1998 time period and to
18 your report at page 5. So you've referenced ChemFab's
19 construction of two new coating towers without a
20 construction permit in 1998, correct?

21 A. Correct.

22 Q. And that resulted in a \$2,500 fine?

23 A. \$2,500 fine, yes. I believe -- is -- I'm just
24 clarifying. Is that what you said? Because that's the
25 number I recall.

1 Q. Yes. 2,500. So I'm on page 5 of your report.
2 First full paragraph at the top, and the last sentence.
3 You state that "The penalty imposed by DEC was minor,
4 but, as Dr. Hopke pointed out, penalties for failure to
5 obtain a construction permit for new sources can be
6 severe." Do you see that?

7 A. I do.

8 Q. Do you disagree with the \$2,500 penalty
9 imposed by Vermont DEC on that occasion?

10 A. Yes.

11 Q. On what basis?

12 A. On the basis of the past history of the
13 company of failure to apply for permits or to give
14 notice when they were constructing towers in the past
15 and the fact that they had applied for a permit and
16 knew how to apply for a permit and -- so there's no
17 question that -- that they knew what the requirements
18 were and then chose not to fulfill them.

19 Q. Did Vermont DEC act within its authority in
20 imposing a \$2,500 penalty?

21 A. Yes.

22 Q. What factors does Vermont DEC take into
23 account when deciding what penalty to impose?

24 A. They take two large categories of factors.
25 One relates to the economic benefit of the violation

1 obtained by the violator or alleged violator, and the
2 second is the gravity of the violation. And the
3 gravity of the violation is informed by a variety of
4 other subfactors and criteria, including the
5 seriousness of the harm and risk to public health, the
6 extent and duration of the violation, the degree to
7 which the violation undermines the integrity of the
8 regulatory program, and the past history of
9 noncompliance.

10 Q. Do you know whether Vermont DEC applied those
11 criteria in determining what penalty to apply in this
12 case?

13 A. I assume that they did, because it was -- it's
14 been a matter of policy for many years, but I do not
15 know for certain that they did.

16 Q. So you have not seen any documentation
17 explaining their analysis of those -- of those
18 elements, gravity and economic benefit?

19 A. Correct. Actually, I -- I -- there may have
20 been a reference in the -- in the record, a memo from
21 Chris Jones, suggesting that the company did not get an
22 economic benefit.

23 MR. WEINRAUB: Let's mark Exhibit 10.

24 (Deposition Exhibit No. 10 was
25 marked for identification.)

1 BY MR. WEINRAUB:

2 Q. Is Exhibit 10 the memo that you referenced a
3 moment ago?

4 A. Yes.

5 Q. Okay. So you have seen this document before?

6 A. I have.

7 Q. Looking at page two of the memo -- my mistake.
8 Let's turn back to page one. In the middle of the
9 first full paragraph, and I'm starting partway through
10 a sentence, it states, "all parties agreed that there
11 was no evidence that ChemFab had started operation of
12 either tower prior to the issuance of the air pollution
13 control permit." Do you see that language?

14 A. I do.

15 Q. Is that something that could reasonably be
16 taken into account under the gravity prong?

17 A. Yes, it could. I would note, though, that
18 the -- the public policy underlying the nature of the
19 preconstruction requirement is to avoid the
20 construction of these types of equipment, to avoid the
21 kind of pressure in regulatory agencies that occurs
22 once a company's made a substantial capital investment
23 in a project that then becomes a significant economic
24 burden on the company. So the purpose of the
25 preconstruction is to have the permit in place before

1 the construction occurs. So it's -- while it's
2 mitigating, it's only slightly mitigating that they had
3 not actually operated the facility.

4 Q. So it would not have been a significantly more
5 substantial violation to operate those new towers for
6 years without a construction permit?

7 A. It would have been substantially more grave in
8 terms of the gravity of the violation had they done it
9 for years, but simply turning on the -- the --
10 operating the equipment for a short period of time
11 would have been slightly worse, but not substantially.
12 The real violation of the intent of the preconstruction
13 requirement really goes to the fact of the construction
14 of the towers without preapproval.

15 Q. If we could turn now to page two of that same
16 memo. And at the end of the carry-over paragraph, the
17 last few sentences state, "Mr. Tilgner said that it was
18 necessary for the company to move forward quickly in
19 order to fill the contract for fabric for Saudi Arabia
20 and that when they contacted the Air Division they
21 believed that we had given them a waiver of the need to
22 obtain a permit prior to installing the new -- the two
23 towers. Mr. Tilgner said that he understood now that
24 there was a misunderstanding, and he acknowledged that
25 they were in violation of the construction permit

1 requirements of the Air Pollution Control Act." Do you
2 see that?

3 A. I do.

4 Q. Could Vermont DEC have taken that explanation
5 into account under the gravity prong?

6 A. They -- they might well have taken his
7 apparent apology or acknowledgment into account.

8 Q. You say "apparent." Are you doubting the
9 sincerity of the statement that was made?

10 A. No, I'm not doubting the sincerity of it. I
11 was describing it as an apparent apology.

12 Acknowledgment is the actual words that he used.

13 Q. And when Mr. Tilgner refers to a
14 misunderstanding, do you have any reason to dispute
15 that there was a legitimate misunderstanding on the
16 part of Mr. Tilgner mistakenly believing that the
17 construction permit application had been waived in
18 light of the time frame to ramp up for this -- for this
19 manufacturing run?

20 A. I do have -- nothing to do with Mr. Tilgner's
21 credibility but simply the circumstances -- the nature
22 of the circumstances where there was a substantial new
23 investment and product and contract that was trying to
24 be fulfilled, the nature of the conversations between
25 ChemFab and the governor all suggest that the company

1 was pushing hard to get a waiver or to move past any
2 regulatory obligations in their haste to get the
3 project under way.

4 Q. Earlier you testified in connection with the
5 gravity prong that -- that you disagreed with the
6 \$2,500 penalty, correct?

7 A. (Witness nods head).

8 Q. One of the reasons was the company's prior
9 construction without a construction permit and the fact
10 that they knew how to do a construction permit and they
11 didn't do it. Do you think that Mr. Tilgner's
12 statement that this was actually a misunderstanding
13 rather than a deliberate course of action to -- to act
14 without a necessary permit is something that Vermont
15 DEC could legitimately take into account?

16 MS. JOELSON: Object to the form.

17 A. I think they could take it in -- into account,
18 certainly, but a mere statement post hoc is not
19 sufficient to overcome the broader context of this
20 violation.

21 Q. And as a result, regardless of that
22 explanation, Vermont DEC imposed a \$2,500 penalty,
23 correct?

24 A. Correct.

25 Q. And the memo states towards the bottom, "Mr.

1 Spinosa and Jones proposed that ChemFab pay a penalty
2 of \$2,500 to reflect the seriousness of the permitting
3 violation as regards the integrity of the air pollution
4 control program." Do you see that?

5 A. I do.

6 Q. So would you agree that Vermont DEC took the
7 integrity of the program and the requirement of
8 construction permits into account when setting that
9 \$2,500 penalty?

10 MS. JOSELSON: Object.

11 A. I think the statement speaks for itself, that
12 they -- they did. And this is a memo, I believe, that
13 was drafted, yes, by Chris Jones, so it's his -- his
14 impression that this was significant and that he agreed
15 with Mr. Spinosa that it was in fact a significant
16 penalty.

17 Q. And Mr. Spinosa and Mr. -- Mr. Jones had the
18 opportunity to actually sit down and directly interact
19 with the players on the ChemFab side, correct?

20 A. Correct.

21 Q. And you have not had that opportunity?

22 A. Yes. No, I did not. Nor did I have any
23 contact with the governor, who apparently was
24 interested in their decision.

25 Q. And so do you have any basis to say that

1 Vermont DEC got it wrong and that the \$2,500 penalty
2 was inadequate?

3 A. Yes. As I said, the -- the very nature of the
4 violation, the construction of a new set of operating
5 lines to build a new product, without getting
6 preapproval, knowing and having past experience with
7 the obligation to get that approval, suggests to me
8 something that goes straight to the integrity of the
9 regulatory program and should have been given a more
10 substantial penalty. And also it's not clear to me
11 given the number of days that would have been
12 associated with this penalty how they could possibly
13 have limited the penalty to only \$2,500.

14 Q. Did Vermont DEC abuse its discretion in
15 setting the penalty at that level?

16 A. No.

17 Q. Did Vermont DEC act arbitrarily or
18 capriciously in setting the penalty at that level?

19 A. No. I mean, that's a legal conclusion, but
20 I'm -- I'm using those words in the -- you know, the
21 ordinary sense that they're intend- -- I assume that
22 they were intended, that it was not -- they clearly had
23 a set of information and context and facts that they
24 relied upon to make their decision, and they did at
25 least assess some level of a penalty.

1 Q. And the fact that you would have landed
2 differently on the gravity prong doesn't necessarily
3 mean that the regulators in charge at that time got it
4 wrong, does it?

5 A. Wrong is a subjective term, but I accept that
6 they were in those seats and I was not.

7 MR. WEINRAUB: I think this might be a good
8 point for a break, and I'm fine to make it either a
9 ten-minute break or a lunch break depending on what
10 people want to do.

11 MS. JOSELSON: Should we go off the record?

12 THE VIDEOGRAPHER: Going off the record at
13 12:25.

14 (A lunch recess was taken.)

15 THE VIDEOGRAPHER: We're back on the record at
16 1:34.

17 BY MR. WEINRAUB:

18 Q. Okay. Ready to proceed, Mr. Mears?

19 A. Yes.

20 Q. Okay. Now that we've had lunch, let's talk
21 about objectionable odors. So if we could look at your
22 report at the bottom of page 5 and top of page 6. And
23 in the carry-over paragraph and towards the end of the
24 paragraph, there's a reference to over 100 documented
25 violations. Do you see that?

1 A. I do.

2 Q. What's the basis for that number, over a
3 hundred?

4 A. The -- the complaints. The various complaints
5 that were purported.

6 Q. Okay. And so is that the 60 or so complaints
7 identified by Dr. Hopke plus the additional 42
8 complaints referenced in your report?

9 A. Correct.

10 Q. Is it your opinion that each one of those
11 complaints constitutes a distinct violation?

12 A. No. It's an overstatement in my report.

13 Q. Are you able to estimate the number of
14 violations that you believe occurred?

15 A. I'd have to go back and -- and look through
16 and see how many of the same complaints occurred on
17 each day and which ones were verified or corroborated,
18 so not off the top of my head, no.

19 Q. Do you know whether Dr. Hopke has performed
20 any analysis along those lines?

21 A. Not that I have seen.

22 Q. And just so I'm clear, have you yourself
23 performed any analysis like that that you just don't
24 recall, or have you not performed that kind of
25 analysis?

1 A. I have not performed that analysis.

2 Q. Is that an analysis that you ever performed
3 while working at Vermont DEC?

4 A. No.

5 MR. WEINRAUB: Let's mark Exhibit 11.

6 (Deposition Exhibit No. 11 was
7 marked for identification.)

8 BY MR. WEINRAUB:

9 Q. Do you recognize Exhibit 11 to be the 1972 air
10 pollution control rules?

11 A. I do.

12 Q. Actually, before we proceed, let me make sure
13 I didn't already mark this before.

14 MS. JOELSON: Not today.

15 MR. WEINRAUB: Not today? Okay. My memory is
16 playing tricks on me.

17 Q. So let's stick with Exhibit 11, and let's turn
18 to Section 5-241. And subsection 2 under Section 5-241
19 is titled "Odors." Do you see that?

20 A. I do.

21 Q. Does that subsection contain the regulatory
22 definition for offensive odors?

23 A. Yes.

24 Q. And are you generally familiar with that
25 definition?

1 A. Yes.

2 Q. Has that --

3 A. I'm sorry. I hesitate just briefly because I
4 can't recall if that's changed in recent years, but
5 yes, this is clearly the -- the regulation in place in
6 1972.

7 Q. Okay. And you -- you anticipated my next
8 question, which is, As you sit here, do you know
9 whether this regulatory definition is substantially
10 similar to the definition that exists today?

11 A. My recollection is that it is, but I wouldn't
12 be certain without looking at the current regulations.

13 Q. So under the 1972 rules, to meet the
14 regulatory definition, an odor would need to be deemed
15 objectionable by a specific percentage of exposed
16 people, correct?

17 A. Correct.

18 Q. And the percentage that's required depends in
19 part on the sample size?

20 A. Yes.

21 Q. And so for a sample of 20 people or more, at
22 least 15 percent of those people would have to deem the
23 odor to be objectionable for it to satisfy that
24 regulatory definition?

25 A. I think you just repeated what was in the

1 statute -- I mean the regulation.

2 Q. Yeah. That's what -- I'm trying to
3 essentially paraphrase and make sure I'm understanding
4 what the -- what the regulation is.

5 A. Yes.

6 Q. So is my encapsulation of the regulatory
7 language so far, so good?

8 A. So -- so far, so good.

9 Q. And then if the -- if you have fewer than 20
10 people in your sample, am I correct that you need to
11 have at least four people that are not from the same
12 household?

13 A. Correct.

14 Q. And in that sample that's more than four but
15 less than 20, at least 75 percent of that sample would
16 have to deem the odor to be objectionable?

17 A. Correct.

18 Q. And are those the criteria or are those
19 substantially similar to the criteria that you would
20 need to apply in reviewing the complaint record to
21 determine how many distinct objectionable odor
22 violations occurred?

23 A. Yes. I mean, there's two things. I'd want to
24 confirm what the specifics are of the regulations in
25 place at the relevant time frame, but yes, and to look

1 at the number of people exposed and -- and whether
2 they're, you know, in the same family or not -- or in
3 the same household or not.

4 Q. And at least during the period that the 1972
5 rules were in effect, you would need to apply those
6 criteria to each instance of odor complaints, correct?
7 Let me -- let me try to make that a little more clear.

8 You'd need to -- you'd need to talk to people
9 exposed on the same day, right?

10 A. That would be the easiest, but spread out over
11 time, even, if you had -- you know, within a relatively
12 contiguous amount of time you had a substantial number
13 of people all complaining of -- of odors, that would be
14 relevant to determining whether or not there had been a
15 violation.

16 Q. Would the source of the odor need to be
17 consistent if you were looking at a contiguous period
18 of time of longer than one day? So, for example, if on
19 Tuesday you have a complaint of odor during the point
20 where a particular tower is being run and on Wednesday
21 a different tower's being run, could you talk to people
22 exposed during those two days and aggregate them
23 together to determine whether there was an odor
24 violation?

25 MS. JOELSON: Object to the form.

1 A. Yes. Because the -- the prohibition relates
2 to the whole facility, not just a particular unit.

3 Q. To your knowledge, is there any limit on the
4 contiguous period of time that you can aggregate
5 together in that way?

6 A. I am not certain what the past practice or
7 guidance documents might have been developed within DEC
8 to try to constrain the potential open-endedness of
9 that. I would assume it would be a reasonableness
10 standard. And as I described earlier, I mean, that's
11 one of this -- the complexity in proving these cases is
12 one of the reasons that agencies frequently do not take
13 an enforcement action limited solely to a question
14 of -- of odor complaints.

15 Q. Does your report quote or summarize the
16 criteria for determining -- determining objectionable
17 odor under this regulatory provision?

18 A. No.

19 Q. Does Dr. Hopke's report quote or summarize
20 these criteria?

21 A. No.

22 Q. If you can turn to page 6 of your report.
23 Middle of the page under "Visible Air Emission
24 Exceedances." There's a sentence that reads, "The 1998
25 and 1999 inspections made it clear that odor and

1 visible emissions were continuing." Do you see that?

2 A. I do.

3 Q. And there's a citation to inspection reports
4 by Philip Etter dated February 12, 1998, and April 13,
5 1999?

6 A. Yes.

7 MR. WEINRAUB: Let's mark Exhibit 12.

8 (Deposition Exhibit No. 12 was
9 marked for identification.)

10 BY MR. WEINRAUB:

11 Q. Feel free to take more time to read it if you
12 want, but I'll -- I'll preview my question for you,
13 which is, Is Exhibit 12 the February 12, 1998,
14 inspection report referenced on page 6 of your report?

15 A. Yes.

16 Q. And could you turn to the last page of this
17 exhibit.

18 A. Yes.

19 Q. And there's a Section V, "Findings," and then
20 finding number 4 states, "We did not determine that
21 Chemfab was emitting objectionable odors beyond the
22 property line of the company during this inspection"?

23 A. Yes.

24 Q. So at least during the 1998 inspection, would
25 you agree that no objectionable odor violation was

1 noted?

2 A. By Mr. Etter, yes.

3 Q. So is it accurate to say that that report
4 makes it clear that odor and visible emissions were
5 continuing?

6 A. Yes, it does. Under Section V.1., it makes it
7 clear that they were emitting significant visible
8 emissions when they first arrived.

9 Q. But focusing on the word "odor," though, does
10 the 199- -- does the 1998 report support that statement
11 with respect to odor?

12 A. Not in a concrete way, but he definitely -- he
13 acknowledges and notes that there were odors at the
14 facility. He just couldn't attribute them to the
15 ChemFab plant.

16 Q. Okay. And not all odors constitute violations
17 of the air pollution control rules, correct?

18 A. Correct.

19 Q. The permit conditions that were operative
20 beginning with the 1990 permit require ChemFab to take
21 reasonable precautions to prevent the discharge of
22 objectionable odors beyond the property line; would you
23 agree? And we can turn to the exhibit if you need.

24 A. I -- I agree. If you don't mind, I wouldn't
25 mind looking at the permit.

1 Q. Sure.

2 A. It's Exhibit 9. Yes. I see that condition
3 number 7 states that they shall make -- take reasonable
4 precautions.

5 Q. Is it possible for precautions to be
6 reasonable at the time they're taken even if they
7 subsequently don't prove to have been a hundred percent
8 effective in preventing odor?

9 MS. JOELSON: Object to the form.

10 A. It might be a reasonable effort. Whether or
11 not that satisfies the obligation to continue to alter
12 the operations or find the source of the -- the odors
13 and then to modify the activities or install new
14 pollution controls is a -- is a different question. It
15 might be reasonable in a time-limited way. It's not
16 reasonable over a long-term period, like 20 or 30
17 years.

18 Q. Are you generally familiar with odor surveys
19 that ChemFab commissioned during the 1980s?

20 A. Yes. I was -- I mean, I'm not familiar -- I
21 didn't read all those documents, but I'm familiar that
22 there was an assessment done.

23 Q. And you're aware that those odor surveys were
24 performed by DuPont?

25 A. Yes.

1 Q. And that DuPont recommended certain steps
2 to -- to mitigate odor?

3 A. I don't recall what the recommendations were.
4 I just recall reference to a survey by DuPont.

5 MR. WEINRAUB: Let's mark Exhibit 13.

6 (Deposition Exhibit No. 13 was
7 marked for identification.)

8 BY MR. WEINRAUB:

9 Q. Have you seen this document before?

10 A. I have.

11 Q. And if you'll turn with me to the last page
12 and the final paragraph, it states, "The Air Division's
13 position has been that while some limited interim steps
14 can be taken by Chem Fab (and have been) to abate odor
15 emissions, such as improving fume capture into the
16 control equipment, significant capital expenditures
17 should not be made until the nature of the hazardous
18 air contaminant problem (if any) is better understood."
19 Do you see that?

20 A. I do.

21 Q. Are you generally aware that ChemFab was
22 prepared to make capital improvements at this time but
23 that DEC preferred to wait until further emissions
24 analysis had been conducted?

25 MS. JOELSON: Objection.

1 A. Well, there was certainly an implication in
2 this document, but I wasn't aware of that in terms of
3 other specific information.

4 Q. Let's switch topics to -- to abators. One of
5 the violations asserted in your report is failure to
6 maintain abator temperature; is that correct?

7 A. Correct.

8 Q. What is your understanding of how catalytic
9 abators work?

10 A. I don't actually know how catalytic abators
11 work.

12 Q. Do you have an understanding as to how the
13 operating temperature of a catalytic abator affects its
14 efficacy?

15 A. I have assumed without knowing that the higher
16 the temperature, the more destruction of pollution
17 occurs and the cleaner the emissions.

18 Q. And do you have an understanding as to whether
19 that's a linear process or some other sort of curve in
20 terms of effectiveness in relation to temperature?

21 A. I do not.

22 Q. So, you know, in this case ChemFab's abators
23 were meant to be operated at 600 -- 600 degrees
24 Fahrenheit or above, correct?

25 A. That is my understanding.

1 Q. Do you have any understanding as to whether,
2 you know, the effectiveness of catalytic abators falls
3 off a cliff if you're at 599 degrees or whether -- you
4 know, whether that would make a material difference in
5 efficacy?

6 A. I do not.

7 Q. At page 6 of your report, in the bottom
8 paragraph, you note that inspections in 1998 and 1999
9 showed that temperatures were below the 600 degrees
10 Fahrenheit required by the permit, correct?

11 A. Correct.

12 Q. And those temperatures were 590 degrees and
13 580 degrees, respectively. So my question is, Do you
14 have any understanding as to whether those deviations
15 below 600 degrees had any material effect on the
16 operation of the abators?

17 A. I assume that they -- that the regulators and
18 the scientists who chose the 600 degrees Fahrenheit had
19 a reason for doing so and that there was a loss of
20 effectiveness below that, but that's an assumption. I
21 don't have any personal knowledge of how the abators
22 work or whether or not the nature of that violation was
23 material in terms of the relationship to the amount of
24 emissions.

25 I would note that one of the -- the issues

that comes out through the record is that there was a fair amount of confusion that continued through the '90s about the ability of the catalytic abators to remove -- remove the chemicals and how -- and whether they were maintained up correctly and -- or replaced appropriately and which -- which pollutants they actually removed. The entire period of time that the State and ChemFab were discussing the abators, there is a fair amount of disagreement and confusion about what the appropriate treatment method is.

Q. One reason the company used abators is that the permits required them to use abators; isn't that true?

1 A. It is true. But the -- the way that the
2 permitting process works is that the state permit
3 writers rely upon the application, the applicant, to
4 identify the source of the -- the kinds of contaminants
5 that are occurring and the best means of treatment of
6 those contaminants and so would have relied heavily on
7 ChemFab.

8 Now, there would have been some exchange, as
9 you can see in the record, between ChemFab and the
10 state permit writers over what the appropriate method
11 is, but ultimately it's ChemFab's responsibility to
12 identify and apply for the appropriate treatment.

13 Q. Do you have any understanding as to whether
14 the abators were intended to remove PFOA or APFO from
15 ChemFab's emissions?

16 A. It seems relatively clear that ChemFab did not
17 choose its pollution control equipment based on any
18 concerns about PFOA or -- or other related chemicals
19 that might be resulting from its process, so no, I
20 don't think that they chose the treatment based on
21 concerns about PFOA.

22 Q. And do you have any opinion as to whether
23 abators are effective in removing PFOA or APFO?

24 A. Yes.

25 Q. What is your opinion?

1 A. No.

2 Q. It is your opinion that they are not effective
3 in removing PFOA or APFO?

4 A. Correct.

5 Q. So to the extent that allowing the abator
6 temperature to fall to 590 degrees Fahrenheit and 580
7 degrees Fahrenheit as noted in the two inspection
8 reports, those violations, if they were violations,
9 would have no bearing on emission of PFOA or APFO,
10 correct?

11 MS. JOSELSON: Objection.

12 A. I don't know if they would or would not have
13 had any effect. I have to assume that there -- at
14 higher temperatures there might have been greater
15 removal levels, again, based on my common understanding
16 of pollution control equipment. I would -- I would
17 also note that the purpose of this portion of my report
18 really go, again, to refuting statements that were made
19 that are very strong statements that Mr. Flechas made
20 that the State was in -- approved of what ChemFab did,
21 that ChemFab was operating in full compliance and with
22 the cooperation of the State, and this is just one
23 example of a way in which even under the clearly
24 inadequate controls that ChemFab had, that they weren't
25 even operating those consistently with the requirements

1 in their permit.

2 Q. If I understand your testimony correctly, your
3 opinion is that abators are categorically ineffective
4 at removing PFOA and APFO from a plant's emissions; is
5 that accurate?

6 A. Categorically in the sense of it's
7 self-evident that they were not. Now, the extent to
8 which they removed some portion of PFOA or other
9 related constituents I'm -- I really -- I don't know
10 and don't have an expert opinion about.

11 Q. Do you have any opinion as to whether
12 operating abators at 590 or 580 degrees as opposed to
13 600 degrees had any material impact on any PFOA or APFO
14 emissions from the ChemFab plant?

15 MS. JOELSON: Objection.

16 A. The -- I have an opinion that typically
17 conditions like a 6- -- or temperature -- minimum
18 temperature requirement for abators are based on the --
19 the minimum acceptable removals that are necessary, you
20 know, under the operation of that equipment, so I
21 understand that there was some effect of going below
22 600 degrees, but I really don't have an expert opinion
23 about that. I don't know how these -- this piece of
24 equipment operates or what the, you know, 10- or
25 20-degree difference would make on its effectiveness

1 generally, much less with regard to PFOA.

2 Q. So as you sit here, you have no opinion as to
3 whether these asserted violations had any impact on
4 PFOA or APFO emissions at ChemFab's plant, correct?

5 MS. JOELSON: Objection.

6 A. The challenge I'm just having is the way you
7 phrase the question with "any impact." I have an
8 opinion that there may have been an impact. Again,
9 assuming that the 600-degree limit was selected by
10 experts for a reason, I assume that it may have had an
11 effect on the effectiveness of it, but beyond that
12 assumption, I don't have any expert knowledge or
13 expertise with regard to the operation of these kinds
14 of abators.

15 Q. And your assumption that the 600-degree
16 Fahrenheit requirement implies some drop-off in
17 efficacy, that relates primarily to the chemicals that
18 the abators were intended to remove, does it not?

19 A. I don't know what chemicals they were designed
20 to remove and whether or not it was -- typically
21 they're not designed for, like, a specific chemical
22 atom or molecule. They're designed to deal with
23 categories and sometimes multiple categories. Often
24 pollution control equipment removes -- will destroy
25 both particulate matter and -- and remove volatile

1 organic chemicals and a broad family of volatile
2 organic chemicals, like toluene and benzene and others,
3 so I just don't know the -- the nature of these
4 particular abators and what families of chemicals or
5 pollutants they might have been intended to remove.

6 Q. And again, to make sure I understand, is it
7 your opinion that the abators used in Bennington and
8 North Bennington had no significant impact in reducing
9 any APFO or PFOA emissions?

10 MS. JOELSON: Same objection. Asked and
11 answered at least three times. Objection to the form.

12 THE WITNESS: Should I answer?

13 MS. JOELSON: Yup.

14 A. So my response is that the -- I apologize. I
15 thought I understood the question, but do you mind
16 repeating it?

17 Q. Sure. Let me -- let me try to start over and
18 I'll -- you know, I'll assume the same objections
19 apply.

20 Am I correct that your opinion is that the use
21 of abators in the Bennington and North Bennington
22 facility would not have had any significant impact in
23 reducing any emissions of APFO and PFOA?

24 MS. JOELSON: Objection.

25 A. It's the -- it's the "any" in terms of

1 significant. It clearly did not effectively remove
2 PFOA, but whether it had some effect, whether it
3 removed some portion of -- of those -- that family of
4 chemicals, I just don't know.

5 Q. And so to be clear, I'm not asking you to
6 definitively opine that there was zero effect, but if
7 you -- if you don't know whether there was any effect,
8 can you say with any confidence that operating 10 or 20
9 degrees below 600 degrees Fahrenheit made any
10 appreciable difference in APFO or PFOA emissions?

11 MS. JOSELSON: Same objection. Asked and
12 answered. I think we're probably on question number
13 ten of the same subject matter.

14 A. Yeah. I just -- I don't -- I don't have
15 enough technical expertise with regard to this type of
16 pollution control equipment to have any sense of what
17 that change in temperature -- how material that would
18 be and how substantial.

19 Q. Okay. Okay. Let's change tacks and discuss
20 hazardous air contaminants. And if you could turn to
21 your report at page 7. In the first paragraph under
22 heading 3, you state that Vermont hazardous air
23 contaminant guideline-- -- well, strike that.

24 In the first paragraph under heading 3, you
25 state that "the Vermont hazardous air contaminant rule

1 went into effect in 1981." Do you see that?

2 A. I do.

3 Q. And you further state that the 1981 rule
4 "placed the burden on the source to identify hazardous
5 air contaminants that meet the definition in Section
6 5-101 subparagraph 26"?

7 A. Correct.

8 Q. Let's take a look at the 1981 regs.

9 MR. WEINRAUB: And this will be Exhibit 14.
10 (Deposition Exhibit No. 14 was
11 marked for identification.)

12 BY MR. WEINRAUB:

13 Q. So turning first to -- to that definition,
14 5-101 subparagraph 26, which is on page 3 of the
15 exhibit.

16 A. I'm sorry. Which -- which definition?

17 Q. This is the definition of hazardous air
18 contaminant.

19 A. Got it.

20 Q. And so this definition states that "'Hazardous
21 Air Contaminant' means an air contaminant for which no
22 ambient air quality standard has been adopted and which
23 in the judgment of the Secretary, taking into account
24 its quantity, concentration or physical, chemical or
25 infectious characteristics, causes, or contributes to,

1 air pollution which may reasonably be anticipated to
2 result in an increase in mortality or an increase in
3 serious irreversible, or incapacitating reversible
4 illness." Did I read that correctly?

5 A. Yes.

6 Q. Am I correct in understanding that definition
7 to say that, among other things, to meet the definition
8 of a hazardous air contaminant, the contaminant must
9 cause or contribute to air pollution?

10 A. Yes.

11 Q. Let's turn to the definition at subsection 5
12 of air pollution. And subsection 5 states that "'Air
13 Pollution' means the presence in the outdoor atmosphere
14 of one or more air contaminants in such quantities, and
15 duration as is or tends to be injurious to human health
16 or welfare," and the definition continues.

17 Did I read that portion of the definition
18 correctly?

19 A. Yes.

20 Q. Am I correct in understanding that under the
21 regulatory definition of air pollution any health
22 hazards must be associated with the presence of a
23 contaminant in the outdoor atmosphere?

24 A. Yes. That's the nature of -- of an emission
25 is that it's emitted into the atmosphere. It doesn't

1 mean that the harm needs to occur in the atmosphere.

2 Q. So you would not, then, agree with me that
3 Vermont's hazardous air contaminant rules relate to
4 exposures to contaminants that are present in the
5 outdoor atmosphere?

6 A. They include that but are not limited to harm
7 that occurs in the outdoor atmosphere.

8 Q. What is your basis for saying that they're not
9 limited to harms that occur from exposure to
10 contaminants in the outdoor atmosphere?

11 A. Well, assuming you mean by -- one means by
12 "atmosphere," which I think this does, the -- the
13 ambient air that surrounds us all, then that's too
14 limiting. The harm may be that -- that the contaminant
15 is -- you know, falls into the soil or into surface
16 water or groundwater and has an impact, and that would
17 still constitute a hazardous air contaminant.

18 Q. What is your basis for saying that -- that a
19 contaminant where the only hazards relate to its
20 eventual presence in soil, surface water, or
21 groundwater could still be a hazardous air contaminant?

22 MS. JOELSON: Objection to the form.

23 A. I didn't say that it would be solely -- those
24 harms would be solely limited to that, but I suppose
25 you might have a chemical that would somehow magically

1 not be harmful in the atmosphere and yet be harmful in
2 groundwater due to some chemical reaction with water, I
3 suppose, but most likely in my experience what happens
4 is these chemicals are toxic all the way through their
5 life, but when they're -- the place where they're
6 readily measured and found tends to be in the soil or
7 water, and so the fact that you didn't measure it when
8 it was in the air doesn't mean that it didn't come from
9 the air or that it isn't considered a hazardous air
10 contaminant.

11 Q. Can you give me any example of a substance
12 that is not hazardous in the outdoor atmosphere but
13 that is nevertheless considered a hazardous air
14 contaminant because of subsequent hazards associated
15 with its presence in other media?

16 A. No. And I feel like we're getting -- going
17 down a rabbit hole. I mean, you asked me the question
18 of whether or not an air contaminant needed to be
19 something that was limited to its presence in the
20 outdoor atmosphere, and what I was saying was that it's
21 not limited to a contaminant that is only present in
22 the outdoor atmosphere, but if it comes to land in the
23 soil or water, for instance, it could also have been a
24 hazardous air contaminant.

25 Q. Can you cite any authority supporting that

1 interpretation of air pollution under the Vermont
2 regulations?

3 A. I suppose I could if I did some research. Not
4 off the top of my head.

5 Q. Looking at the definition of air pollution, it
6 specifically refers to the presence in the outdoor
7 atmosphere of one or more air contaminants, correct?

8 A. Correct.

9 Q. And it refers to the presence of those
10 contaminants in the outdoor atmosphere in such
11 quantities and duration as is or tends to be injurious,
12 correct?

13 A. That's what it says.

14 Q. Based on this definition, how could a
15 contaminant's presence in the outdoor atmosphere below
16 levels deemed injurious constitute air pollution,
17 regardless of downstream effects in soil or
18 groundwater?

19 MS. JOSELSON: Objection to form.

20 A. There's nothing in this definition to suggest
21 that the injury has to occur only while the pollutant
22 is in the atmosphere. The injury could occur after the
23 pollutant has accumulated in the soil or water.

24 Q. Are you familiar with EPA's National Air
25 Toxics Assessment program?

1 A. Generally. Not specifically in the sense of
2 I'm not deeply familiar with it, but I know that it
3 exists.

4 MR. WEINRAUB: Let's mark Exhibit 15.

5 (Deposition Exhibit No. 15 was
6 marked for identification.)

7 BY MR. WEINRAUB:

8 Q. I'll represent to you that this comes from
9 EPA's website. And if I could ask you to look at the
10 first sentence under the heading "What is NATA?" It
11 states, The National Air Toxic Assessment, NATA, is
12 EPA's ongoing review of air toxics in the United
13 States.

14 You see that?

15 A. I do.

16 Q. And turning to the top of the second page,
17 there's a heading that says "What NATA is not." And in
18 the second paragraph under that heading towards the end
19 of the paragraph, it states, "NATA only considers
20 health effects from breathing these air toxics. It
21 ignores indoor hazards, contacting or ingesting toxics,
22 and any other ways people might be exposed." Do you
23 see that language?

24 A. I do.

25 Q. Is it fair to say that EPA's National Air

1 Toxics Program considers only inhalation hazards and
2 not hazards that might result from contaminants
3 formerly present in the air but subsequently present in
4 other media?

5 A. I -- the -- it's not a -- this is not a
6 regulatory entity. It's -- it's doing a set of
7 assessments, and so it's distinguishing the toxicity
8 associated with breathing from other types of toxicity
9 for the purposes of, you know -- you know, targeting
10 its scientific review and analysis. It's not an
11 interpretation of the breadth of -- of the national air
12 pollution toxics program as implemented by EPA in the
13 states. Certainly it's not, you know, a -- an
14 interpretation that's relevant to understanding what
15 Vermont's definition of hazardous air contaminant
16 means.

17 Q. Would you agree that NATA does what it does to
18 inform EPA's administration of its hazardous air
19 pollution rules?

20 MS. JOSELSON: Object to the form.

21 A. I assume that it is -- and would hope that
22 it's one of the major sources of information that the
23 EPA permitting programs and enforcement programs rely
24 upon in determining the relevant, you know, effects
25 of -- of air emissions when inhaled, but it's not --

1 there's nothing that would suggest to me that it's
2 intended to somehow limit the breadth and reach of the
3 authority of the EPA to regulate air toxics.

4 MR. WEINRAUB: Let's mark Exhibit 15 -- oh,
5 16. Apologies.

6 (Deposition Exhibit No. 16 was
7 marked for identification.)

8 BY MR. WEINRAUB:

9 Q. Have you seen this document before?

10 A. I saw reference to this document, but I have
11 not seen the actual document.

12 Q. Do you recognize the name Bill Bress, Ph.D.?

13 A. I do.

14 Q. He is an environmental toxicologist with
15 Vermont's Department of Health?

16 A. He is. And as I noted earlier, highly
17 respected.

18 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[illegible]

Q. And you think that was a mistake?

1 A. It was obviously a mistake in retrospect. Now
2 we know that, you know, surrounding the site are very
3 high levels of PFOA in the soil and groundwater and
4 that the most likely source of those -- of that
5 contamination was from ChemFab's emissions, air
6 emissions. Secondly, that he didn't understand or
7 appreciate that he didn't have the full spectrum of
8 potential contaminants to -- to evaluate.

9 Q. So Dr. Bress is a toxicologist whom you've
10 spoken very highly of today, correct?

11 A. Yes.

12 Q. You've worked with him personally?

13 A. Yes.

14 Q. You had glowing words to say about him at the
15 beginning of today's deposition?

16 MS. JOSELSON: Object to the form.

17 A. Glowing. Well, he's highly respected, and I
18 respect him.

19 Q. His apparent understanding of definition of
20 hazardous air contaminant aligns more closely with my
21 interpretation than with yours; wouldn't you agree?

22 A. No. I don't see any interpretation whatsoever
23 in here of hazardous air contaminant.

24 Q. Do you see any reference to potential hazards
25 of any contaminant in any media other than in the

1 ambient air?

2 A. No.

3 Q. And you think it was a mistake that Dr. Bress
4 focused only on hazards related to the presence of
5 contaminants in the ambient air and not in other media,
6 correct?

7 MS. JOSELSON: Object to the form.

8 A. Yes. And I'll note from my personal
9 experience with -- with Dr. Bress that he was very
10 concerned about -- ultimately and primarily about
11 public health impacts. He would not have been in the
12 business of drawing arbitrary lines between whether or
13 not the -- the chemicals or toxic substances were in
14 the air or in the soil or in the water. He would have
15 been concerned ultimately about the impacts on public
16 health, so I see here only that he probably limited his
17 assessment to what he was asked to do, which is what
18 he -- review of the information about what was present
19 in the air.

20 Q. And who do you think asked him to do that?

21 A. I assume that it was to Harold Garabedian, to
22 which he directed his opinion and report.

23 Q. During your time at Vermont DEC -- strike
24 that.

25 Would you be able to point me to any document

1 like this in the regulatory record in this case or that
2 crossed your desk while you were commissioner of
3 Vermont DEC where Bill Bress or any other toxicologist
4 evaluated air emissions under the hazardous air
5 contaminant rule based on potential hazards associated
6 with exposure in medias other than the ambient air?

7 MS. JOSELSON: Objection.

8 A. I don't recall a specific instance of that.
9 It wouldn't surprise me. Again, for Dr. Bress and for
10 the folks at the Department of Environmental
11 Conservation, they might at some point in a -- in the
12 context of implementing a regulation and program try to
13 sort out and clarify which regulatory program was the
14 appropriate one to apply in terms of -- of how to
15 regulate it and which vehicle, whether it was a
16 hazardous waste or clean air or clean water or drinking
17 water program, but their first and primary interactions
18 at this level, you know, substantive level about the
19 technical scientific piece, would have been to assess
20 ultimately what were the ultimate effects on public
21 health.

22 They would not -- they would be working well
23 beyond their own particular programmatic and
24 jurisdictional limitations to try to figure out what
25 were the nature of those problems, and then in an

1 instance like this, if there were other programs that
2 should be involved or engaged, then they would broaden
3 the technical and scientific inquiry. It would be up
4 to the lawyers later on in the process to determine
5 what to do with that information and how the agency
6 should apply it in terms of the regulatory programs.

7 Q. But in this e-mail, which is focusing
8 specifically on air toxics, we don't see any of that
9 occurring, do we?

10 MS. JOSELSON: Object to the form.

11 Q. We don't see any focus beyond exposures in the
12 ambient air?

13 A. His -- his statement here is -- is definitely
14 responsive to an apparent question of what are the
15 hazard levels in the ambient air, and he says he
16 doesn't see anything above the hazard levels.

17 Q. And as you note, there are other regulatory
18 programs to regulate hazards in other media, such as
19 drinking water or groundwater or soil, correct?

20 A. Correct.

21 Q. To your knowledge, has Vermont ever set
22 hazard-limiting values for the presence of PFOA or APFO
23 in the ambient air?

24 A. For PFOA, no.

25 Q. Or APFO?

1 A. No.

2 Q. To your knowledge, has EPA ever set
3 hazard-limiting values for PFOA or APFO in the ambient
4 air?

5 A. Not to my knowledge.

6 Q. To your knowledge, has Vermont DEC ever
7 required a company to test its emissions for PFOA or
8 APFO?

9 A. I don't know that, but I would be surprised --
10 I would not be surprised if they weren't looking at
11 emissions across the state, potential sources, and
12 engaged in a discussion with those sources about
13 whether or not they needed permit limits for it, but I
14 don't -- I don't have any personal knowledge of that.
15 That's just an assumption.

16 Q. In the absence of any hazard-limiting values
17 for the presence of APFO or PFOA in the ambient air, do
18 you have any understanding as to how Vermont DEC would
19 evaluate emissions tests showing that PFOA or APFO were
20 being emitted?

21 A. Yes.

22 Q. What's your understanding?

23 A. They would have a dialogue with the Department
24 of Health toxicologist; they would be looking at the
25 nature of the -- the toxicity, the potential sources

1 or -- not -- potential recipients who would be
2 vulnerable to it, the pathways for exposure; and they
3 would be also engaged in conversation with EPA, which,
4 of course, has much greater scientific resources;
5 they'd be looking at other states like California, to
6 the European Union; for literature reviews; and then
7 they would be making their best judgment based on all
8 that information on whether there should be a numeric
9 limitation based on risk or a prohibition or to require
10 further study.

11 Q. To your knowledge, nothing like that has
12 occurred to date in connection with emissions of PFOA
13 or APFO in Vermont, correct?

14 A. I just -- would be surprised if there was not
15 a very active conversation that's been happening over
16 the last two or three years around that very topic, but
17 I have not been personally involved in those, so I
18 cannot say one way or the other.

19 Q. Let's turn to page 5 of your report. I'll
20 warn you in advance I'm pretty sure I got the page
21 wrong. Let me find out where I'm supposed to be. Make
22 that page 8 of your report.

23 At the end of the first paragraph, it states,
24 "Had the Vermont DEC been informed by Saint-Gobain that
25 it was emitting APFO from the North Bennington Plant,

1 the Department had the authority to require the company
2 to perform the analysis required by the Hazardous Air
3 Contaminant Rule." Do you see that?

4 A. I do.

5 Q. And would you agree that that authority would
6 depend, at least in part, on the judgment of the
7 secretary of ANR as to whether APFO or PFOA were
8 hazardous air contaminants?

9 MS. JOSELSON: Object to the form.

10 A. The secretary is informed by his or her, you
11 know, scientific staff.

12 Q. And let me -- that was a poorly teed-up
13 question. Apologies for jumping around, but let's go
14 back to the 1981 regs and to the definition of
15 hazardous air contaminant --

16 A. Yeah.

17 Q. -- which is paragraph 26.

18 A. Yup.

19 MS. JOSELSON: Exhibit 14, are we?

20 MR. WEINRAUB: Yes. 14.

21 A. Yup.

22 Q. So subparagraph 26 defines hazardous air
23 contaminant to mean "an air contaminant for which no
24 ambient air quality standard has been adopted and which
25 in the judgment of the Secretary, taking into account

1 its quantity," et cetera, then no longer quoting, may
2 reasonably be anticipated to result in increased
3 mortality or illness.

4 Do you see that?

5 A. I do.

6 Q. So part of the criteria for whether an air
7 contaminant constitutes a hazardous air contaminant is
8 whether the secretary judges there to be a health
9 hazard, correct?

10 A. You're using "health hazard" to kind of
11 summarize that phrase at the end about its physical,
12 chemical characteristics, et cetera, but yes, that's
13 fundamentally -- the primary concern around hazardous
14 air contaminants are the impacts on human health,
15 although impacts on the environment may also be
16 considered.

17 Q. Okay. And we have a disagreement about
18 whether the risks to the environment or health needs to
19 relate to the presence in the outdoor atmosphere, but
20 putting that aside, ANR has the ability to add a
21 contaminant to its hazardous air contaminant list and
22 remove all doubt about whether this definition applies,
23 does it not?

24 MS. JOSELSON: Object to the form.

25 A. It does, yes.

1 Q. And you believe that Saint-Gobain and ChemFab
2 should have spontaneously identified PFOA or APFO as
3 hazardous air contaminants prior to 2002, correct?

4 MS. JOELSON: Objection.

5 A. I'm not sure what you mean by "spontaneous,"
6 and certainly it wasn't their obligation to list it.
7 That's up to the department to list a contaminant, but
8 it is the obligation -- the entire Clean Air Act and
9 the implementation by the State of Vermont relies upon
10 companies that in the first instance know what their
11 process is, know what chemicals they're using, and have
12 the capacity and ability to determine how best to treat
13 those, to identify those, and, where they have
14 questions or concerns, to dig deeper and to do the
15 research necessary for the secretary to be able to make
16 those types of determinations.

17 Q. So turning back to your report on page 8, just
18 to reread that quote at the end of that first
19 paragraph, you state that "Had the Vermont DEC been
20 informed by Saint-Gobain that it was emitting APFO from
21 the North Bennington Plant, the Department had the
22 authority to require the company to perform the
23 analysis required by the Hazardous Air Contaminant
24 Rule." Correct?

25 A. Correct.

1 Q. And yet to this day in 2018, Vermont has not
2 added PFOA or APFO to its list of hazardous air
3 contaminants, correct?

4 A. As far as I know, they have not.

5 Q. Do you have any reason to think that learning
6 of APFO emissions in 1997 would have resulted in DEC or
7 ANR identifying APFO as a hazardous air contaminant?

8 A. Yes.

9 Q. What's the basis for that understanding?

10 A. Given the information that has come out and
11 came out, you know, in the years following that about
12 the health impacts of APFO and PFOA on human health, I
13 have no doubt that they would have given consideration
14 to listing it as a hazardous air contaminant by virtue
15 of the definition that you read earlier, you know, from
16 the 1981 rules about chemicals that -- or contaminants
17 that may cause an increase in mortality or serious
18 reversible -- or irreversible illnesses.

19 Q. Then why haven't they done so?

20 A. As of -- well, there's two reasons. One is
21 the major source of air emissions of APFO or PFOA,
22 ChemFab, closed in 2002 and hasn't been present.
23 Secondly, until just two or three years ago, the State
24 of Vermont was not aware that the air emission of PFOA
25 could cause such substantial harm to public health.

1 Q. If ChemFab or Saint-Gobain had disclosed in
2 the late 1990s that any emissions of APFO or PFOA were
3 occurring, Vermont DEC wouldn't have had that health
4 information, would they?

5 MS. JOSELSON: Object to the form.

6 A. There has been -- as -- as is played out
7 nationally and in the state, there's a growing
8 awareness that there was a fair amount of information
9 from DuPont and even from ChemFab, you know, from its
10 own health study, that there were unexplained health
11 impacts of exposure to chemicals, now most likely
12 determined to be PFOA, that would have raised serious
13 red flags for the Department of Health and for the
14 Agency of Natural Resources, and at a minimum there
15 would have been an obligation placed on ChemFab to the
16 extent it had continued operating to pay for extensive
17 additional analysis and study of that.

18 So whether they would have actually listed it
19 or they simply would have required additional analysis
20 or they would have participated in a national
21 conversation about the nature of the risks, it's pure
22 speculation, but there's ample information to suggest
23 that had ChemFab at the time identified and notified
24 the State of the nature of these chemicals and the
25 potential risks, that there would have been additional

1 regulatory action.

2 Q. You predicted my next question again, which
3 is, You are currently engaging in pure speculation
4 about what Vermont DEC would have done had it been
5 informed of those emissions in 1997, are you not?

6 MS. JOSELSON: Object to the form.

7 A. I don't think I said pure speculation, but I
8 did say speculation, and it would be informed
9 speculation in that I have observed over the years that
10 when health and safety and environmental regulatory
11 agencies are presented with information that suggests
12 significant potential health risks, that they will
13 require additional analysis and engage with the
14 regulated entities, with other states, and with EPA to
15 understand those risks and determine the appropriate
16 regulatory action, which could -- could have included
17 listing it as a hazardous air contaminant. But I don't
18 know because ChemFab did not in fact notify or pursue
19 the risks associated with the chemicals it was using or
20 the unexplained impacts on the health of its employees
21 or the -- the persistent public complaints around odor
22 and nuisance.

23 Q. Do you have any information -- my apologies.
24 I didn't mean to interrupt.

25 A. Nuisance was the last word I said.

1 Q. Do you have any information that ChemFab
2 attributed any health effects among its employees to
3 exposure to PFOA or APFO?

4 A. No, I do not.

5 Q. Okay. Let's test your theory about what would
6 have happened in this counterfactual world. Are you
7 aware that Vermont DEC was asked on at least two
8 occasions in 2016 whether residents who have inhaled
9 fumes were at increased risk?

10 MS. JOSELSON: Object to the form of the
11 question. Object to the rudeness implied in the
12 question. If you want to reask the question in a more
13 respectful way, that would be much appreciated.

14 MR. WEINRAUB: I did not -- I did not intend
15 to be disrespectful, and I don't think I was, but --
16 but I won't argue the point and I will repeat it.

17 Q. Are you aware that Vermont DEC was asked on at
18 least two occasions in 2016 whether residents who had
19 been exposed to fumes were at increased risk as a
20 result of breathing the fumes during the period that
21 ChemFab was operating in North Bennington?

22 MS. JOSELSON: Object to the form.

23 A. No, I was not aware of that round of -- two
24 rounds of questions.

25 MR. WEINRAUB: Let's mark Exhibit 17.

1 (Deposition Exhibit No. 17 was
2 marked for identification.)

3 BY MR. WEINRAUB:

4 Q. So I take it you have not seen this -- this
5 document before?

6 A. No, I have not.

7 Q. This is an e-mail chain involving some names
8 that I think we've discussed earlier. Chuck Schwer,
9 that's someone that you are familiar with?

10 A. Yes, I am. And I'm seeing Sarah Vose. That's
11 the -- the toxicologist at the Department of Health
12 that I referenced earlier that replaced Bill Bress.

13 Q. And I think you also referred to Alyssa
14 Schuren at one point?

15 A. Yup. She was at this time the commissioner of
16 the department. I know all these folks. And Richard
17 Spiese works for Chuck in the -- the waste division,
18 and Lori Cragin works with Sarah at the Health
19 Department.

20 Q. So Chuck's e-mail - this is dated February 28,
21 2016 - states, "Here is the list of questions from
22 Friday's meeting. We should start filling in the
23 answers."

24 And then if you could turn to question number
25 18. I'm looking at the wrong document. Hang on one

1 moment. I've got the right one. Question number 18:
2 "Was there an inhalation danger while the plant was
3 operating" -- or "when the plant was operating?" Do
4 you see that?

5 A. I do.

6 Q. And then just turning quickly to the second
7 instance.

8 MR. WEINRAUB: This will be Exhibit 18.

9 (Deposition Exhibit No. 18 was
10 marked for identification.)

11 MS. JOSELSON: I'll just note we've been going
12 about an hour, so you decide when you're ready.

13 MR. WEINRAUB: Sure. Let's do this exhibit
14 and then maybe take a break.

15 BY MR. WEINRAUB:

16 Q. So this is an e-mail chain where the -- the
17 top e-mail is dated March 4, 2016, with some of the
18 same personnel. Do you see that?

19 A. I do.

20 Q. Then if you turn to the back page, in the top
21 carry-over paragraph, there's a -- well, let me back
22 up.

23 Bottom of the first page, there's an e-mail
24 from Gail Mauricette to Chuck Schwer?

25 A. Um-hum.

1 Q. And Ms. Mauricette identifies herself as a
2 resident who lives on Polygraphic Lane in North
3 Bennington. And then on the carry -- at the end of the
4 carry-over paragraph, she says, We have municipal
5 water. I know that the priority now has to be testing
6 wells, but all of us in the area that spent years
7 inhaling the smoke from the ChemFab plant are concerned
8 about the long-term health effects, especially on our
9 children who grew up smelling the chemicals. Should we
10 all have blood work done?

11 Do you see that?

12 A. I do.

13 Q. To your knowledge, has Vermont DEC or ANR ever
14 indicated that there was reason for concern among
15 residents exposed only via inhalation during the time
16 that ChemFab was operating?

17 MS. JOELSON: Object to the form.

18 A. Now we're outside of the scope of the
19 documents I reviewed as part of the deposition, but --
20 and you're asking a question that kind of goes beyond
21 my opinion, but I -- I do recall that there has been a
22 concern about -- that's been expressed by a variety of
23 people, and I don't know exactly who, but including
24 public officials, about whether or not people who
25 worked at the plant may have been exposed in ways that

1 caused them to have health impacts. I don't recall
2 whether it had to do with inhalation or other types of
3 exposure.

4 But I -- I also recall that some of the
5 question and concern related to people who also smoked
6 cigarettes and worked in the plant and that there
7 may -- they may not have cleaned their hands before
8 smoking and that there may have been some exposure
9 through that pathway, but really I'm -- I'm out -- out
10 of my comfort level in terms of I don't have a specific
11 document or anything I'm relying on. That's just my
12 recollection from general discussions.

13 Q. Okay. That's fair enough. And putting aside
14 these specific e-mails, do you have any knowledge of
15 any statement by Vermont ANR to the effect that there's
16 any particular concern related to inhalation exposure
17 by nonemployees?

18 A. I am not aware of that. I would be surprised
19 if they were crossing any concerns off the list of
20 things to be worried about, but I understand that the
21 primary concern has been the -- the groundwater present
22 in people's water.

23 MR. WEINRAUB: Okay. Why don't we take a
24 ten-minute break.

25 THE VIDEOGRAPHER: Going off the record at

1 Q. And then one of the documents cited in the
2 parenthetical that follows is a June 17, 1985,
3 Environmental One report. Do you see that?

4 A. I do.

5 Q. Have you read Dr. Hopke's deposition
6 transcript?

7 A. No, I have not.

8 Q. Okay. Do you have any knowledge as to whether
9 that 1985 Environmental One report was submitted to
10 Vermont DEC in 1985?

11 A. I do not.

12 Q. Do you have any basis to dispute that by 1985
13 Vermont DEC was informed that ChemFab's process
14 included use of PFOA as a constituent of the PTFE
15 dispersion?

16 A. No. I have -- I have no basis to say one way
17 or the other.

18 MR. WEINRAUB: Let's mark Exhibit 19.

19 (Deposition Exhibit No. 19 was
20 marked for identification.)

21 BY MR. WEINRAUB:

22 Q. Have you seen this document before?

23 A. No, I have not.

24 Q. So the document is titled "Trip Report," and
25 next to "Participants," one participant is identified

1 as Michael Nelson of Vermont ANR. Do you see that?

2 A. I do.

3 Q. Do you know Michael Nelson?

4 A. I do not.

5 Q. So it refers to an inspection on July 12,
6 1989. And if you look at the second paragraph under
7 the heading "General Description."

8 A. Yes.

9 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14 Q. And then the paragraph ends, "This material is
15 not considered to be hazardous." Do you see that?

16 A. I do.

17 Q. Can we turn back to page 8 of your report?
18 And in the top paragraph, second sentence, it states,
19 The New York Department of Environmental Conservation
20 became concerned about emission of APFO, in
21 parentheses, the ammonium salt of PFOA, from similar
22 Teflon coating processes in 1997.

23 Do you see that?

24 A. I do.

25 Q. And then your report references a memo dated

1 March 21, 1997, found in the Vermont DEC files.

2 A. Yes.

3 Q. First of all, do you have any information as
4 to whether ChemFab was informed of New York DEC's
5 concerns in 1997?

6 A. Well, A, the presence of this in the DEC file
7 suggests that someone was aware of it in the
8 department. I also recall - I can't remember the
9 date - that there was an exchange in which someone at
10 DEC referenced the -- the New York plant and issues
11 with PFOA there, but I can't recall the specifics off
12 the top of my head. It may be later in the report.

13 Q. So the 1997 report, that is an internal DEC
14 memo; is that correct?

15 A. No, I don't believe so. I believe that the
16 March 21 -- is that the one you said? March 21?

17 Q. Yes. The March 21, 1997, memo.

18 A. I believe --

19 Q. Apologies. Was that a memo from Vermont --
20 from New York DEC to Vermont DEC?

21 A. No. My recollection is that it was an
22 internal memo within New York DEC, but it had obviously
23 been sent to somebody at Vermont DEC. That's my
24 recollection. I mean, we could pull it up and look at
25 it, but that's what I recall.

1 Q. Do you have any information as to whether the
2 memo was ever shared with ChemFab?

3 A. I don't know.

4 Q. ChemFab was still operating in Vermont in
5 1997, correct?

6 A. Correct.

7 Q. After receiving this information regarding
8 New York DEC's concerns, did Vermont DEC ask ChemFab to
9 test its emissions for PFOA or APFO?

10 MS. JOSELSON: Object to the form.

11 A. As far as I know, they did not.

12 MR. WEINRAUB: Let's mark Exhibit 20.

13 (Deposition Exhibit No. 20 was
14 marked for identification.)

15 BY MR. WEINRAUB:

16 Q. Have you seen this document before?

17 A. Yes.

18 Q. And this is a September 20, 1999, memo from
19 Philip Etter to Chris Jones, correct?

20 A. Correct.

21 Q. And if you'll turn to the final paragraph on
22 page 2, Mr. Etter's report states, "I am uncertain that
23 any of the testing done at Chemfab has specifically
24 tried to identify perfluoroisobutylene (CAS number:
25 382-21-8) or ammonium perfluorooctanoate." Do you see

1 that?

2 A. I do.

3 Q. And ammonium perfluorooctanoate is APFO?

4 A. Correct.

5 Q. Mr. Etter goes on, If not, I recommend that,
6 during future testing, we test for these specific
7 chemicals which are mentioned in a March 21, 1997, memo
8 from the New York DEC as being problematic from a
9 toxicity standpoint.

10 Do you see that?

11 A. I do.

12 Q. And at no time after this September 20, 1999,
13 memo did Vermont DEC ask ChemFab to test its emissions
14 for PFOA or APFO, correct?

15 MS. JOELSON: Objection.

16 A. I actually don't know that to be true one way
17 or the other, but as far as I know, they did not. I
18 mean, there's certainly nothing in the records I
19 reviewed that suggested that they had. Whether or not
20 there was informal exchanges around that or other
21 documents that I haven't reviewed, I just don't know.

22 Q. If Vermont DEC knew in 1997 of New York DEC's
23 concerns about APFO emissions from a Teflon plant and
24 didn't ask ChemFab to test its emissions for APFO, why
25 do you think that Vermont DEC would have required

1 ChemFab to test its emissions for APFO if ChemFab had
2 told them that that was a possible component of their
3 emissions?

4 MS. JOSELSON: Object to the form.

5 A. I'm -- I lost the premise of the question. If
6 ChemFab had --

7 Q. So earlier on I had asked you if -- if Vermont
8 DEC had known that APFO was being emitted from the
9 ChemFab plants, would it have taken any action.

10 A. Right. I understand.

11 Q. And so in 1997 Vermont DEC was informed that
12 New York DEC had concerns about PFOA emissions from a
13 Teflon plant, right?

14 A. (Witness nods head).

15 Q. And yet they didn't ask ChemFab to test its
16 emissions for PFOA. Why do you think that DEC would
17 have taken a different approach if ChemFab had
18 identified PFOA as one of its potential emissions?

19 A. I see what you're saying. Well, as -- as a
20 first point, you know, it's clear that the -- the
21 department should have, in hindsight should have,
22 followed up on this with the -- with the company. So
23 that -- that's the first point.

24 The second point is that -- that failure to do
25 that doesn't mean that ChemFab fulfilled its

1 obligations to independently identify and raise the
2 question and to pursue it with the department.

3 Q. ChemFab's obligations under the hazardous air
4 contaminant rule depend on the assumption that ANR's
5 secretary would consider PFOA or APFO to meet the
6 regulatory definition of a hazardous air contaminant,
7 do they not?

8 MS. JOELSON: Objection.

9 A. I mean, it's ultimately up to the secretary of
10 the Agency of Natural Resources to designate things.
11 That's their responsibility. But who petitions them to
12 do that, it could be the company petitions them; it
13 could be an out- -- external entity; it could be the
14 staff that make the recommendation.

15 Q. But putting aside, you know, the HAC list, the
16 judgment of ANR's secretary is explicitly built into
17 the definition of a hazardous air contaminant, correct?

18 A. Correct.

19 Q. And so unless the secretary would consider a
20 substance to be a hazardous air contaminant, the
21 hazardous air contaminant rules don't apply; isn't that
22 right?

23 MS. JOELSON: Objection.

24 A. If a company has a chemical that they know or
25 should know has the potential to cause human health

1 risks, they have an obligation to notify the secretary
2 and/or his or her staff of that risk so the secretary
3 can make that determination. They're not -- it's
4 not -- it's not that they have no obligation until the
5 secretary identifies the risk. I mean, if the
6 secretary puts something on the list, then yes, they
7 must respond to that, but the fact that it's not on the
8 list doesn't mean that they are not obligated to know
9 what they're emitting and to assess the risks of that
10 chemical and to make sure that the secretary and his or
11 her staff know what those risks are.

12 Q. Is it possible that the reason that DEC did
13 not respond to this information in 1997 and Mr.
14 Etter's -- Mr. Etter's recommendation in 1999, is it
15 possible that the reason that they didn't ask ChemFab
16 to test its emissions for PFOA or APFO is that Vermont
17 ANR does not consider PFOA or APFO to meet the
18 regulatory definition of a hazardous air contaminant?

19 MS. JOELSON: Objection.

20 A. That's possible as -- it's also possible that
21 they just didn't have the time to get to it, that the
22 memo got lost, that Phil Etter was transferred, that
23 another bigger issue came up and they dealt with that
24 first. There's a variety of reasons why they might not
25 have moved forward with it. As I said, in retrospect,

1 I'm sure if you asked these folks, they -- they would
2 probably say they wished that they had done that
3 additional testing and analysis or, you know, done
4 additional evaluation.

5 Q. Are you familiar with Dr. Hopke's opinion that
6 ChemFab or Saint-Gobain should have used different
7 control technologies to remove PFOA from plant
8 emissions?

9 A. Yes. I saw that.

10 Q. And specifically Dr. Hopke references
11 scrubbers and wet electrostatic precipitators as
12 alternate technologies?

13 A. Yes.

14 Q. Do you know what a scrubber is?

15 A. In a general sense, yes.

16 Q. Do you know how scrubbers work with regard to
17 removing PFOA from emissions?

18 A. I don't know. I think it would -- it's a --
19 it's a technology that works best on particulate
20 matter, but I think it assumes that the -- the form,
21 the physical form, of the PFOA would be in particulate
22 matter or attached to particulate matter.

23 Q. Do you know what a wet electrostatic
24 precipitator is?

25 A. Generally.

1 Q. Do you know how that technology works in
2 removing PFOA from emissions?

3 A. I don't know specifically how that works.
4 That's a little further afield for me.

5 Q. Your report does not address scrubbers or wet
6 electrostatic precipitators, correct?

7 A. Correct.

8 Q. Do you have an opinion as to whether ChemFab
9 or Saint-Gobain violated any Vermont regulations by not
10 using one or both of those technologies?

11 A. The reason I'm hesitating is I'm not sure
12 quite how to characterize it. There seemed to me to be
13 substantial circumstantial evidence suggesting that
14 large volumes of PFOA escaped the plant and have caused
15 health impacts, and that -- that set of facts, if -- if
16 proven correct, are absolutely -- would be a violation
17 of the air pollution control laws, but I don't have any
18 specific -- you know, it's -- the specific failure to
19 install these particular control technologies is not in
20 and of itself a violation.

21 Q. The emission of PFOA in and of itself
22 constitutes a violation; is that your opinion?

23 A. The emission of a chemical that causes public
24 health and environmental harm is -- raises a
25 substantial question about whether or not there was a

1 violation, yes.

2 Q. Have you opined in your report to a reasonable
3 degree of certainty that release of PFOA in and of
4 itself constitutes a violation?

5 A. I did not make that assertion. Most of my
6 report is really focused on responding to -- to Mr.
7 Flechas' overbroad statements about the degree to which
8 the department knew, comprehended, participated in,
9 gave guidance to, and permitted ChemFab to operate in
10 the way that it did, resulting in the emission of PFOA.
11 That -- that is an overstatement, and that's the main
12 point that I'm trying to make in my report.

13 Q. To your knowledge, during your tenure at
14 Vermont DEC, did DEC ever require any companies to use
15 scrubbers or wet electrostatic precipitators?

16 A. I don't know specifically, but I -- I would be
17 shocked if we didn't. It's a very common requirement
18 to be put on any industrial facility.

19 Q. And what -- do you have any understanding as
20 to what chemicals those technologies are used to
21 remove?

22 A. The collection of pollution control equipment
23 you just described remove a pretty broad array of -- of
24 chemicals, including particulate, criteria pollutants
25 like sulfur dioxide and NOx, a variety of toxic air

1 pollutants, so -- but I don't know the specifics.

2 Q. And just to -- just to be clear, during your
3 time at Vermont DEC, to your knowledge, did DEC ever
4 require any companies to use those technologies
5 specifically to remove PFOA from their emissions?

6 A. Oh, I'm sure they did not.

7 Q. Are you aware of any company anywhere in the
8 world that was using scrubbers or wet electrostatic
9 precipitators during the period that ChemFab operated
10 in Vermont to remove PFOA emissions?

11 A. I'm unaware of -- of that one way or the
12 other.

13 MR. WEINRAUB: So I think I may actually be
14 close to done, so I want to propose we take another
15 ten-minute break and I'll just quickly go through my
16 notes. I trust no one would be horribly offended if we
17 made it an early day, so, yeah, why don't we go off.

18 THE VIDEOGRAPHER: Going off the record at
19 3:23.

20 (A recess was taken.)

21 THE VIDEOGRAPHER: We're back on the record at
22 3:34.

23 MR. WEINRAUB: Nothing further from me at this
24 time. Thank you very much, Mr. Mears.

25 THE WITNESS: Thank you.

EXAMINATION

BY MS. JOSELSON:

Q. Mr. Mears, in the last round of questions, you were asked about Exhibit 20 and whether or not Vermont DEC acted in a timely manner to request ChemFab/Saint-Gobain to test for PFOA in its emissions. Do you remember that line of questions?

A. Yes. Yes.

MR. WEINRAUB: Just note my objection to the form.

Q. Do you know how long it was after the date of Exhibit 20, September 20th, 1999, that the company closed its plant in Vermont and moved out of state?

A. My recollection is it was 2002.

Q. Could it have been earlier?

A. It could have been. I know that there were discussions in some of the documents suggesting that they were considering moving their operations earlier in discussions with state economic development officials.

Q. Did you have anything else you wanted to testify to with regard to the 1997 to 1999 period when Vermont DEC is apparently in communication with the New York DEC regarding testing for -- requiring testing for PFOA in ChemFab's emissions?

1 MR. WEINRAUB: Objection to form.

2 A. I want to thank you for asking that. The one
3 other thing that I felt like is relevant and it's
4 somewhat uncomfortable to talk about because I have
5 great respect for -- for Chris Jones and for Phil Etter
6 and for Dick Valentinetti and Harold Garabedian, but I
7 do think that -- I wonder given the nature of the other
8 communications that are kind of running in parallel to
9 this that involve Secretary Ripley and the Governor's
10 Office and others whether or not the concerns about the
11 company leaving caused them to go slow in terms of
12 moving forward on the concerns that they'd heard from
13 New York, and I just -- I just don't know what happened
14 informally within the department, what happened back
15 and forth between ChemFab, but the question had been
16 kind of why -- why didn't the State move forward, and I
17 really don't have a great explanation, because in
18 retrospect it seems clear that they should have moved
19 more promptly, but I -- I have to think that there was
20 a broader context that was making it complicated for
21 the regulators to -- to act.

22 Q. Regardless of whether the regulators acted in
23 that period or earlier to require ChemFab to do other
24 testing or take other actions, what is the burden on an
25 industry like ChemFab under Vermont's air pollution

1 regulatory scheme?

2 MR. WEINRAUB: Objection to the form.

3 A. The primary obligation on -- in all of the
4 major pollution laws is on the applicant to identify
5 any pollutants that it's going to be emitting and to
6 propose and recommend ways to control that. The
7 agencies necessarily have to rely on the expertise of
8 the sophisticated companies who are much more familiar
9 with the nature of the chemicals they're using, the
10 chemical process, and what the industry practices are
11 around that, so while ultimately the department or the
12 agency make the decisions on what the permits contain,
13 the -- these statutes and programs are premised on the
14 idea that the State can't be everywhere and know
15 everything and that it relies on a significant level of
16 self-disclosure.

17 So that's -- that's a major gap that's
18 occurred in this particular situation, and the failure
19 of the State to take stronger regulatory action is not
20 an indication that they approved, and so kind of
21 contrary to -- to Mr. Flechas' report and statements
22 that the State was aware of and cooperated in and
23 approved and permitted the emission of PFOA by the
24 company, it's just -- it's -- that's not the case. It
25 was primarily on the company to identify that risk and

1 those chemicals and to come up with an appropriate
2 removal system.

3 Q. And if -- you -- do you recall your testimony
4 in the last hour regarding whether if the PFOA that has
5 contaminated hundreds of wells in the Bennington and
6 North Bennington area were determined to be -- to have
7 originated from ChemFab's operations, then that would
8 be substantial evidence of a violation of Vermont's
9 regulatory laws and -- and rules, can you explain a
10 little bit more what you meant by that?

11 MR. WEINRAUB: Objection to the form.

12 A. Yes. If you work -- if one works backwards
13 from the -- the policies and goals stated at the outset
14 of each of these statutes, that are in the legislative
15 history and are captured in the language, which include
16 language like prohibiting the discharge or emission of
17 pollutants that would cause harm to public health or
18 the environment, then the very presence of substantial
19 harm to public health and the environment as, you know,
20 has been found by the State of Vermont as a result of
21 ChemFab's or now Saint-Gobain's emissions is kind of a
22 de facto evidence that the statute purposes weren't
23 fulfilled, and then so working backwards from that, you
24 know, one of the ways in which that should have been
25 fulfilled is that the chemicals should have been

1 identified and should have been treated and removed, so
2 it's -- given that the company's no longer in
3 operation, it's somewhat of an academic exercise to
4 state whether or not it would have been a violation or
5 not, but it's clearly an overstatement to suggest that
6 they were in compliance with the air pollution control
7 laws of the State of Vermont given that -- the nature
8 of the contamination that's occurred.

9 Q. So are you saying that had the company from
10 the outset complied with the requirements of Vermont's
11 regulatory scheme, then they would not have emitted
12 chemicals, including PFOA, that contaminated the
13 environment?

14 MR. WEINRAUB: Objection to the form.

15 A. Correct.

16 Q. And what are the obligations on a company once
17 it has made the decision to close shop and move out of
18 state, as ChemFab did in this case, Saint-Gobain, to
19 look back over its conduct during the years it did
20 operate in a state and come forward with information to
21 notify the State that its operations while it was in
22 the state may have caused harm to the environment or to
23 its neighbors?

24 MR. WEINRAUB: Objection to the form.

25 A. Yes. Under -- under the State's waste --

1 waste laws, it's the -- any company retains an
2 obligation and liability for any harm that it's caused
3 to soil or -- or groundwater or surface water, for that
4 matter, that occur as a result of its emissions and
5 discharges, and so the fact that it stopped operations
6 did not remove it from having an obligation and
7 liability for any -- any harm that it left behind or
8 any chemicals left behind.

9 So in this case ChemFab/Saint-Gobain had and
10 has an obligation to continue to address the
11 contamination that it was responsible for, and that's,
12 I know, you know, a major focus of the interaction
13 between the State and the company today.

14 Q. Are there any other opinions that you'd like
15 to clarify as you expressed them during the course of
16 the depo?

17 A. No. Thank you.

18 MR. WEINRAUB: And I'll have a few follow-ups
19 starting with the last one first.

20 EXAMINATION

21 BY MR. WEINRAUB:

22 Q. You just testified regarding a company's
23 obligations after moving out of the state to look back
24 over its conduct while it was in the state and inform
25 Vermont regulators of any issues. Did you offer any

1 such opinions on that obligation in your report?

2 A. No.

3 Q. You referenced that those obligations arise
4 under the waste laws. Did you offer any opinions
5 regarding waste laws in your report?

6 A. No.

7 Q. Did you offer any opinions in your report
8 under any regulatory program under -- other than the
9 air pollution control rules?

10 A. No.

11 Q. You were asked questions about the period
12 after 1999 -- strike that.

13 You were asked about how long after Mr.
14 Etter's 1999 memo recommending emissions testing for
15 APFO before ChemFab closed up shop and left the state.
16 Do you remember that testimony?

17 A. I do.

18 Q. Do you know whether Vermont DEC after the date
19 of Mr. Etter's memo asked ChemFab for any additional
20 information regarding its emissions?

21 A. I don't recall.

22 Q. You testified that you had some uncomfortable
23 concerns about political issues, communications with
24 the governor, things of that nature. Do you recall
25 that testimony?

1 A. I do.

2 Q. Do you have any basis to opine to a reasonable
3 degree of certainty that that was the reason that
4 Vermont DEC did not require ChemFab to test its
5 emissions for APFO or PFOA?

6 MS. JOELSON: Object.

7 A. No. I mean, beyond what I -- what I stated,
8 which is there's kind of a parallel set of
9 communications involving cabinet-level officials.

10 Q. And do you believe that the DEC officials that
11 you referenced and that you hold in high esteem acted
12 in dereliction of their responsibilities in response to
13 those communications?

14 MS. JOELSON: Object to the form.

15 A. I -- I wouldn't use the word "dereliction,"
16 but it's clear in retrospect that they failed to
17 fulfill the promise that we expect of -- of our public
18 agencies that are tasked with protecting public health
19 and the environment to pursue risks where they're
20 notified of some potential risk to human health and the
21 environment, and I -- you know, they -- they share that
22 along with the officials at ChemFab, who also failed in
23 their duty to identify and address those risks.

24 Q. If APFO and PFOA are not hazardous air
25 contaminants within the regulatory definition, and I'm

1 not asking you to accept that, but if you assume it for
2 the moment, would ChemFab have violated its duties by
3 not testing its emissions for those chemicals?

4 A. Maybe. And I say maybe because it depends on
5 what they knew or should have known, and it depends on
6 what the State would have asked them to do in response
7 to that. If they had -- if the nature of these laws
8 are such that had the company fully disclosed what it
9 knew about the risks or potential risks and the State
10 made an affirmative decision to not act on that, then
11 the company would have done -- would have met its
12 obligations vis-à-vis the regulatory program.

13 Now, it's a whole different situation, and as
14 is noted in the permits and in the statutes, the
15 failure of a state to regulate or the approval that it
16 gives in the course of a permit to authorize a
17 discharge does not relieve the -- the emitter or
18 polluter or discharger from any liability they have for
19 harm to private property or to personal -- to people's
20 persons, but in terms of their liability and
21 obligations under the regulatory program, had they
22 identified all of the risks and all the information
23 they knew about the nature of their chemicals and the
24 State decided not to act on that, then they would have
25 met their obligations.

1 Q. You testified that the presence of harmful
2 contaminants in environmental media that can be traced
3 backwards to a plant's emissions inherently demonstrate
4 regulatory violations. Is that a fair encapsulation of
5 your testimony a moment ago?

6 A. It's a little more specific than I said, I
7 mean, but that's the essence of it, but the -- the
8 difference is it's difficult to know what the
9 regulatory violation would have been, but I'm just
10 going backwards from the point of saying if the purpose
11 of the statutes and of the clean air program at the
12 federal and state level as it is is to protect public
13 health and the environment and to prevent the emission
14 of harmful chemicals, the very presence -- the fact
15 that those chemicals were released through air
16 emissions and caused public health and environmental
17 harm is proof that the regulatory program was not
18 effectively implemented.

19 Now, you asked the question whether or not
20 that would constitute a regulatory violation, and --
21 and as over the course of the day we've explored, there
22 are lots of specific ways in which those -- the goal
23 and purpose of the statute have to be translated by the
24 company and the State into actual permit conditions
25 before one can determine whether or not there was a

1 specific violation, and, of course, that did not
2 happen.

3 Q. Is it fair to say that you are operating from
4 the premise that there has to have been a regulatory
5 violation of some sort and that all that remains to be
6 done is to identify which particular regulation was
7 violated?

8 A. I suppose so. And we should be clear, too,
9 I'm not suggesting that there were not violations at
10 the plant or the facility. There -- there were
11 violations, and we talked about the full range of -- of
12 those kinds of violations, from allegations based on
13 odors all the way to the -- the findings that resulted
14 in assurances of discontinuance. But with regard to
15 the specific emission of PFOA, yes, there would --
16 there are no -- there were no specific violations that
17 occurred in terms of PFOA being on a list of regulated
18 chemicals or in a permit that was violated.

19 What I'm suggesting is that the statute itself
20 prohibits the public health and environmental harms
21 that have resulted when caused by air emissions, and
22 if, for instance, the company were operating today, I'm
23 confident given what it has learned that the State
24 would be taking action to require additional treatment
25 or to -- or shut down the facility to avoid the

1 continuation of that harm.

2 Q. I believe you testified earlier that
3 regulation of PFOA in air emissions essentially became
4 moot after ChemFab moved out of the state.

5 MS. JOSELSON: Objection.

6 Q. Is that a fair summary of your position on
7 that issue?

8 A. No, I didn't say it was moot, but I was
9 just -- you had asked if there was an explanation for
10 why they might not have already issued a hazardous air
11 pollutant limit now, and I don't know, but I was
12 suggesting that one factor may be the fact that a
13 primary source of PFOA emissions has left the state.

14 Q. Could PFOA have continued to be emitted after
15 ChemFab's departure in industrial waste contexts?

16 A. Absolutely, yes.

17 Q. And could PFOA have continued to be emitted in
18 municipal waste? Waste incineration? Let me specify.

19 MS. JOSELSON: Object to the form.

20 A. I suppose so. I'm not aware of any municipal
21 waste incineration in -- in Vermont.

22 Q. Could manufacturing facilities other than
23 ChemFab have been emitting PFOA or APFO after ChemFab's
24 departure without the knowledge of Vermont DEC?

25 MS. JOSELSON: Object to the form.

1 A. Yes, that's possible.

2 MR. WEINRAUB: Okay. Nothing further.

3 EXAMINATION

4 BY MS. JOELSON:

5 Q. To your knowledge, has the State of Vermont
6 identified ChemFab as the source of PFOA contamination
7 in Bennington and North Bennington?

8 A. Certainly -- I mean, there's different areas
9 of contamination, but I know immediately around the
10 plant there seems to be a high level of confidence that
11 that's a result of ChemFab's operations, yes.

12 Q. And that's stated in the consent order that
13 the State reached with ChemFab last year?

14 A. Correct.

15 Q. Do you know if the State has identified any
16 other sources of the PFOA contamination in
17 Bennington-North Bennington area that the State of
18 Vermont has identified as the impacted area on its
19 maps?

20 A. Not that I know with the one exception that
21 there may have been some spots around the landfill that
22 may -- may be associated with the landfill, but I'm
23 operating on -- on information that's really at this
24 point a year old, so there may have been more recent
25 information about that, so -- but in general the

1 predominance -- my understanding is the predominance of
2 contamination as determined by the State of Vermont of
3 groundwater with PFOA is a result of the ChemFab
4 facility.

5 Q. And do you know if the State has identified
6 any industrial entity other than ChemFab who may have
7 deposited PFOA-laden waste in any landfills in the
8 area?

9 A. No.

10 MS. JOELSON: That's all.

11 THE VIDEOGRAPHER: All set?

12 MR. WEINRAUB: Nothing further.

13 THE VIDEOGRAPHER: Okay. Stand by a moment.

14 We are off the record at 3:55. This concludes
15 today's testimony given by David Kruger Mears. Total
16 number of media units was one and will be retained by
17 Veritext Corporation Legal Solutions.

18 Off the record at 3:55.

19 (The deposition concluded at 3:55 PM.)
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25

1 **ACKNOWLEDGMENT OF DEPONENT**

2 I, DAVID K. MEARS, do hereby certify
 3 that I have read the foregoing transcript of my
 4 testimony taken on 9/24/18, and further certify
 5 that it is a true and accurate record of my
 6 testimony (with the exception of the corrections
 7 listed below):

8	Page	Line	Correction
9	_____	_____	_____
10	_____	_____	_____
11	_____	_____	_____
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21 _____

22 **DAVID K. MEARS**

23 **SUBSCRIBED AND SWORN TO BEFORE ME**

24 **THIS _____ DAY OF _____, 20____.**

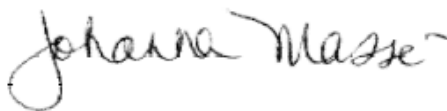
25 _____
 (NOTARY PUBLIC)

 MY COMMISSION EXPIRES:

C E R T I F I C A T E

I, Johanna Massé, RMR, CRR, Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered 5 through 188, inclusive, are a true and accurate transcription of my stenographic notes of the Deposition of David K. Mears, who was first duly sworn by me, taken before me on Monday, September 24, 2018, commencing at 8:58 AM, in the matter of James D. Sullivan, et al., Individually and on behalf of a Class of persons similarly situated v. Saint-Gobain Performance Plastics Corporation, Civil Action No. 5:16-cv-00125-gwc, as to which a transcript was duly ordered. Review of the transcript was requested.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this transcript was produced, and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.



JOHANNA MASSÉ, RMR, CRR

Comm. expires: 2/10/19

[& - 2:47]

Page 1

&	136 4:8	1984 99:4,11	118:18 162:7
& 2:3 6:17	14 4:8 136:9,10	1985 163:2,9,10,12	166:22
0	151:19,20	1987 8:14 71:24	2,500 107:22,23
00125 1:6 5:24	141 4:10	1989 164:6	108:1,8,20 113:6
190:13	143 4:11	199 124:10	113:22 114:2,9
05753-0351 2:4	15 4:10 82:2 87:20	1990 78:17 79:16	115:1,13
1	88:8 119:22 141:4	81:12 86:6 87:23	2/10/19 190:25
1 3:10 5:19 8:2,6	141:5 143:4	88:11,24 89:10,16	2/12/98 4:5
16:14,22 41:23	158 4:13	97:15,18,25 98:23	2/28/16 4:13
42:18 55:24 69:7	159 4:14	98:24 99:17	20 4:17 119:21
69:8 78:11 82:5	16 4:11 23:18 30:6	100:10 102:1,11	120:9,15 125:16
83:1 84:13 100:6	143:5,6	102:25 103:16	132:25 135:8
10 3:22 109:23,24	163 4:16	104:1 105:1,21	166:12,13,18
110:2 132:24	166 4:17	106:13 124:20	167:12 175:4,12
135:8	17 4:13 157:25	1990s 55:13 75:10	189:23
10/1/86 4:7	158:1 163:2	81:4 144:14 155:2	20/20 106:16,25
100 116:24	175 3:4	1993 82:3,8	2000s 54:21
10036-6797 2:10	18 4:14 158:25	1995 83:3,5,11	2002 153:3 154:22
101 30:18	159:1,8,9	1996 78:23 79:18	175:14
109 3:22	180 3:4	80:14 81:2 83:17	2011 10:9
1095 2:9	187 3:5	86:7	2015 10:10 23:18
10:07 42:12	188 190:5	1997 53:16 83:20	2016 41:5,18 157:8
11 4:3 118:5,6,9,17	19 4:16 163:18,19	154:6 156:5	157:18 158:21
11/3/81 4:8	1970 92:22	164:22 165:1,5,13	159:17
11/30/16 3:15	1970s 35:1	165:17 166:5	2018 1:16 5:11,15
111 2:3	1972 4:3 93:21	167:7,22 168:11	16:8 28:14 29:7
118 4:3	94:4 118:9 119:6	170:13 175:22	29:10 30:7 55:24
11:05 78:5	119:13 121:4	1998 107:17,20	154:1 190:9
11:20 78:8	1975 94:8,13 97:9	122:24 123:4,13	20th 175:12
12 4:5 83:5 123:4	1977 92:21 94:8,13	123:24 124:10	21 165:1,16,16,17
123:7,8,13,13	1978 92:16 94:1,16	128:8	167:7
164:5	1979 91:16,19,23	1999 46:13 122:25	212 2:10
12/15/17 3:12	91:25 93:1,8,15	123:5 128:8	24 1:16 5:11 190:8
12/9/98 3:22	95:1,15 97:15,17	166:18 167:12	24th 5:15
123 4:5	97:25 98:6,12	170:14 175:12,22	26 3:12 78:22
126 4:7	102:1,11,25	181:12,14	80:14 136:6,14
12:25 116:13	105:21 106:12	1:34 116:16	151:17,22
13 4:7 123:4 126:5	1980s 125:19	2	28 3:13 83:3
126:6	1981 136:1,3,8	3:12 25:8,10	158:20
	151:14 154:16	26:9,10,14 45:3	2:47 162:1
		65:16 69:12	

[3 - act]

Page 2

3	5-241 118:18,18 5-408 93:20 94:1,4 94:11,14,18,20 95:5,12 96:18 97:13 5/24/96 3:19 5/4/18 3:20 55 3:16 580 128:13 131:6 132:12 590 128:12 131:6 132:12 599 128:3 5:16 1:6 5:24 190:13 5th 8:20	72 94:2,3 75 120:15	abbreviated 31:6 ability 12:3 129:3 152:20 153:12 able 34:15 63:4 66:18 117:13 146:25 153:15 absence 149:16 absolutely 172:16 186:16 abuse 115:14 academic 179:3 accept 116:5 183:1 acceptable 132:19 accepted 50:10 accepting 66:1 access 25:19 107:14 account 91:2 108:23 110:16 112:5,7 113:15,17 114:8 136:23 151:25 accounts 12:10 accumulated 140:23 accurate 8:17 41:12 124:3 132:5 189:5 190:6 accurately 29:6 88:24 acid 38:2 acknowledged 49:21 111:24 acknowledges 124:13 acknowledgment 112:7,12 189:1 act 30:18,18,20 31:9 32:18 33:3 33:12,17 34:9,19 37:24 38:6 44:6
3 3:13 25:9 28:6,7 28:11 30:6 42:15 43:22 53:14 78:10 82:1 84:12 85:17 86:23 87:19,19 91:15,18 93:19 97:22 101:13 135:22,24 136:14 162:4 3/4/16 4:14 30 28:14 29:7,10 29:18 41:5 44:3 70:23 125:16 32250 81:23 351 2:3 382-21-8 166:25 388-6356 2:4 3:23 174:19 3:34 174:22 3:55 188:14,18,19	6 3:18 65:18 81:14 81:15 98:1 101:12 101:16,24 102:13 102:15 116:22 122:22 123:14 128:7 132:17 6/8/90 3:21 60 117:6 600 127:23,23 128:9,15,18 132:13,22 133:9 133:15 135:9 641-5611 2:10	8 3:10,20 87:14,15 88:8 150:22 153:17 164:17 8/1/18 3:16 8/30/18 3:14 802 2:4 80s 54:9 57:6 71:4 98:21 99:1 104:21 81 3:18 82 3:19 87 3:20 89 3:21 8:58 1:17 5:12,15 190:9	
4	6	9	
4 3:15 40:22,23 41:3 44:19,24 45:3 56:4 69:7,8 87:19 88:1 99:3 103:2 123:20 159:17 162:15 40 3:15 400 28:20 42 117:7 453 1:17 5:25	7 3:3,19 44:19,24 45:9 53:14 82:20 82:21,24 101:12 101:21,24 102:13 125:3 135:21 7/12/89 4:16 7/21/92 3:18 70s 54:9	9 3:21 89:12,13,16 99:19,22 125:2 9/20/99 4:17 9/24/18 189:4 90s 54:12,21 98:21 129:3 9442 190:24 9:57 42:9	
5	7	a	
5 3:16 55:20,23 56:5 65:18 94:20 99:4 107:18 108:1 116:22 137:11,12 150:19 190:5 5-101 136:6,14		a2 3:22 4:5,17 abate 126:14 abator 127:6,13 131:5 abators 49:5 100:22 127:4,9,10 127:22 128:2,16 128:21 129:3,8,12 129:15,21,23,24 130:14,23 132:3 132:12,18 133:14 133:18 134:4,7,21	

[act - air]

Page 3

59:15 65:6 78:13 79:2,10,16 80:9,10 81:7 82:4 84:7 90:17,22 91:1 92:20,21 93:12 108:19 112:1 113:13 115:17 153:8 176:21 183:10,24 act's 35:12 acted 175:5 176:22 182:11 action 1:6 5:24 6:5 23:22 54:23 60:17 73:15 75:11 84:21 106:11 113:13 122:13 156:1,16 168:9 177:19 185:24 190:12,17 190:20 actions 10:23 11:3 11:19 12:13 45:20 47:23 58:14,21 63:23 71:16 74:8 74:16 176:24 active 37:7 150:15 actively 96:10 activities 125:13 actual 46:23,24 47:8 112:12 143:11 184:24 add 152:20 added 154:2 adding 39:11 addition 36:4 37:3 37:23 88:2 additional 17:9,16 29:9 52:23 98:18 117:7 155:17,19 155:25 156:13 171:3,4 181:19	185:24 address 9:9 10:13 72:3,19 73:21 76:7 100:16 102:18 172:5 180:10 182:23 addressed 9:19 52:10 101:24 102:12 addresses 37:24 102:17 addressing 37:2 101:22 102:1 129:16 administration 142:18 administrative 58:19 administratively 83:4 adopt 25:10 26:19 35:20 65:24 adopted 43:6 65:23 81:9 91:19 92:21 136:22 151:24 advance 150:20 advantage 69:17 69:23 70:2,19 advocate 68:1,5 advocating 67:22 affiliations 6:9 affinity 144:18 affirmative 183:10 affirmatively 63:22 afield 172:4 agencies 63:19 64:23 76:1 110:21 122:12 156:11 177:7 182:18	agency 4:7 12:12 13:20 60:2 63:14 63:16 66:20,21 74:24 93:22 94:22 95:17 96:12 106:6 148:5 155:14 169:10 177:12 agency's 103:19 aggregate 121:22 122:4 ago 62:5 110:3 154:23 184:5 agree 25:10 41:17 44:7 58:1 62:9 65:25 66:2 74:21 74:23 77:3 83:22 88:18,24 92:13 100:19,24 101:13 101:16,21 102:25 103:1,13 107:9 114:6 123:25 124:23,24 138:2 142:17 145:21 151:5 agreed 5:2 46:17 74:23 100:20 110:10 114:14 agreement 46:4,5 96:15 ahead 7:25 33:2 aimed 143:24 air 3:15 4:4,8 13:7 13:9,11,12,15 14:1 14:5,9,11 15:4,6 25:12 30:18,18,20 30:24 31:4,9 32:18 33:3,12,17 34:9,19 35:12 37:23,24,24 38:4,6 38:7,10,13,17,21 38:24 39:3,6,12,18	40:17 41:3,6,8 42:19,22 43:10,11 43:24 44:21 45:6 51:15 52:13,14 53:15 58:3 59:15 59:15,24 60:6,7,10 60:19,20 65:6 69:20 70:11 75:2 78:13,17 79:2,10 79:16 80:9,10 81:7 84:7 90:17 90:21 91:1,21 92:20,21 95:16 98:6 99:8 101:8 101:14,20 102:16 102:17 106:19 110:12 111:20 112:1 114:3 118:9 122:23 124:17 126:12,18 135:20 135:22,25 136:5 136:17,21,21,22 137:1,8,9,12,12,14 137:21 138:3,13 138:17,21 139:8,9 139:9,13,18,24 140:1,5,7,16,24 141:11,12,20,25 142:3,11,15,18,25 143:3,19,24 144:6 144:10,23 145:5 145:20,23 146:1,5 146:14,19 147:4,4 147:6,16 148:8,12 148:15,23 149:4 149:17 151:2,8,15 151:22,23,24 152:6,7,14,21 153:3,8,23 154:2,7 154:14,21,24 156:17 169:3,6,17
--	--	---	--

[air - approval]

Page 4

169:20,21 170:18 172:17 173:25 176:25 179:6 181:9 182:24 184:11,15 185:21 186:3,10 al 1:3 4:13 190:10 aligns 145:20 allegations 94:14 185:12 alleged 75:24 109:1 alliance 162:12,22 allow 60:1 allowed 36:5,7 allowing 131:5 alter 125:11 alternate 171:12 alternatives 72:15 74:13 alyssa 4:13 20:3 21:14 158:13 ambient 31:3 60:19 136:22 138:13 143:24 144:6,23 146:1,5 147:6 148:12,15 148:23 149:3,17 151:24 amend 14:10 35:13 101:5 amended 78:17 79:16 amendments 41:4 86:6 92:21 americas 2:9 ammonium 164:21 166:25 167:3 amount 13:3 106:21 121:12	128:23 129:2,9 155:8 ample 155:22 analysis 43:18 56:24 96:5 109:17 117:20,23,25 118:1,2 126:24 142:10 151:2 153:23 155:17,19 156:13 171:3 anec 12:9 anecdotally 12:10 anecdotes 12:14 anr 13:23 14:14 75:3 151:7 152:20 154:7 160:13 161:15 164:1 170:17 anr's 169:4,16 answer 10:21 11:16 14:10 22:16 32:23 35:14 36:22 40:20 44:12 47:10 51:9 54:1 73:12 134:12 answered 134:11 135:12 answers 158:23 anticipated 14:18 58:20 119:7 137:1 152:2 anybody 42:1 aod 47:6 apart 24:23 apfo 37:16,19 38:12,20,24 39:5 39:12 40:16 41:18 53:15 130:14,23 131:3,9 132:4,13 133:4 134:9,23 135:10 148:22,25	149:3,8,17,19 150:13,25 151:7 153:2,20 154:2,6,7 154:12,21 155:2 157:3 164:20 166:9 167:3,14,23 167:24 168:1,8 169:5 170:16,17 181:15 182:5,24 186:23 apologies 81:19 99:7 143:5 151:13 156:23 165:19 apologize 134:14 apology 112:7,11 apparent 55:7 112:7,8,11 145:19 148:14 apparently 74:21 114:23 175:23 appear 41:12 58:2 91:4 143:20 appearance 6:11 appearances 2:1 6:9 appeared 38:12 39:5 appears 72:6 appendix 41:6 applicable 86:9 applicant 130:3 177:4 application 32:20 51:12 79:19 80:15 80:16 84:6,19,21 84:25 86:11 87:7 87:11 98:1 103:16 104:6,10 105:1 107:1 112:17 130:3	applied 51:15 52:1 52:18 58:24 59:3 79:17 80:13,22 81:2 98:23 106:19 108:15 109:10 applies 90:22 152:22 apply 34:4 49:13 49:16 51:6 52:5,5 53:1 78:22 80:17 80:20,25 81:6 83:21 84:1 85:13 86:7 92:10 95:18 108:13,16 109:11 120:20 121:5 130:12 134:19 147:14 148:6 169:21 applying 70:20 appreciable 135:10 appreciate 59:10 72:5 84:8 144:15 145:7 appreciated 157:13 approach 34:11 34:24,24 168:17 appropriate 63:8 64:12 65:7 68:23 86:10 106:19 129:10 130:10,12 147:14 156:15 178:1 appropriately 129:6 approval 33:21 82:4 83:13,17 85:25 90:4 115:7 183:15
---	--	---	--

approvals 74:6 87:4 92:8 approve 82:4,13 approved 90:18 90:20 131:20 177:20,23 approving 63:23 approximately 9:15 10:20 20:15 23:14 29:12 april 78:22 79:17 80:14 81:2 83:3 86:7 123:4 arabia 111:19 arbitrarily 52:5 115:17 arbitrary 51:25 146:12 area 12:18 31:12 31:15,17,20 32:2 33:11 34:15 35:16 35:18 37:7,8 71:1 160:6 178:6 187:17,18 188:8 areas 31:9,10,23 45:21,23,24 46:1 53:7 187:8 argue 157:16 arguments 61:14 67:15,20 arranging 23:22 25:2 array 101:9 173:23 arrived 124:8 art 69:24 article 9:25 articles 9:21,23 10:2 aside 106:25 144:20 152:20	161:13 169:15 asked 9:20,24 16:9 16:11 17:2 134:10 135:11 139:17 146:17,20 157:7 157:17 168:7 171:1 175:4 181:11,13,19 183:6 184:19 186:9 asking 39:15 40:7 40:8 64:6 83:22 83:22 135:5 160:20 176:2 183:1 assert 96:20 97:16 asserted 103:21,23 103:24 127:5 133:3 asserting 85:19 assertion 85:23 86:17 173:5 assertions 47:22 63:21 64:19,24 66:1,2 95:8 96:14 107:9 asserts 64:20 assess 68:22 73:15 73:23 115:25 147:19 170:9 assessed 144:16 assessment 125:22 140:25 141:11 146:17 assessments 61:20 142:7 assigning 72:1 associated 37:12 54:15 90:5 101:19 102:8 115:12 137:22 139:14	142:8 147:5 156:19 187:22 assume 66:10 85:14 109:13 115:21 122:9 128:17 131:13 133:10 134:18 142:21 146:21 183:1 assumed 127:15 assumes 171:20 assuming 133:9 138:11 assumption 128:20 133:12,15 149:15 169:4 assurance 94:6,9 94:10 96:12 97:10 97:12 assurances 46:3 96:24 185:14 atmosphere 137:13,23,25 138:1,5,7,10,12 139:1,12,20,22 140:7,10,15,22 152:19 atom 133:22 attached 8:9 171:22 attaining 31:13 attainment 31:3,9 31:12,15,16,18 32:2,19 33:7,11 attempt 69:14 76:22 attend 24:24 attending 6:8 attention 17:21 54:17 55:9,14 143:24	attorney 6:12 7:10 7:18,21 11:7 61:11 64:10 190:15,19 attorneys 16:4,20 attractive 69:19 attribute 124:14 attributed 157:2 audubon 8:21,21 august 28:14 29:7 29:10,18 55:24 authorities 62:10 62:15 64:11 authority 63:7 104:12 108:19 139:25 143:3 151:1,5 153:22 authorization 95:11,11 authorizations 88:4 authorize 183:16 authorized 65:2 authorizing 79:21 available 56:10 62:3 68:20 avenue 2:9 avoid 68:4 110:19 110:20 185:25 avoided 106:22 aware 26:2 43:12 44:2 66:24 67:4,5 72:17 84:22 125:23 126:21 127:2 144:11,17 154:24 157:7,17 157:23 161:18 165:7 174:7 177:22 186:20 awareness 55:1 103:5 155:8
--	--	---	---

[b - capacity]

Page 6

<p>b</p> <p>b 3:8 4:1 41:6</p> <p>back 16:14 29:25 35:13 37:14 41:22 42:11 57:6 61:2 69:6 70:17 71:24 78:7 84:11 91:14 94:12 98:17,21 99:10,11,15 110:8 116:15 117:15 151:14 153:17 159:20,21 162:3 164:17 174:21 176:14 179:19 180:23</p> <p>backdrop 17:23</p> <p>background 66:13</p> <p>backwards 178:12 178:23 184:3,10</p> <p>bar 20:6</p> <p>barrels 14:6</p> <p>based 33:9 50:24 53:20 61:23 66:2 67:6 68:21 130:17 130:20 131:15 132:18 140:14 147:5 150:7,9 185:12</p> <p>basic 91:10</p> <p>basis 37:12 71:16 84:5 85:1,1,7 96:19 108:11,12 114:25 117:2 138:8,18 154:9 163:12,16 182:2</p> <p>battery 37:4</p> <p>bear 55:14 81:18 99:7</p> <p>bearing 131:9</p> <p>began 54:4,24,25 71:24</p>	<p>beginning 6:11 8:13 53:14 124:20 145:15</p> <p>begins 25:9</p> <p>begun 24:12</p> <p>behalf 1:4,16 2:2,7 6:14,17 67:9,13,16 67:22 68:10 190:10</p> <p>behavior 71:18</p> <p>believe 10:1 19:17 30:11 55:6 66:4 66:24 80:16 88:14 92:12 94:9 98:13 106:12 107:23 114:12 117:14 153:1 165:15,15 165:18 182:10 186:2</p> <p>believed 107:12 111:21</p> <p>believing 112:16</p> <p>benefit 86:21 108:25 109:18,22</p> <p>benefits 102:20</p> <p>bennington 4:15 9:13 17:22 18:4,6 18:8,9,13,13,19,19 20:11 22:14,14 23:8,9,24 32:1,5 32:12,15 40:10 54:15 65:20 72:3 72:4,25 92:4,11,15 93:14 98:2 99:25 106:23 134:7,8,21 134:21 143:20 150:25 153:21 157:21 160:3 178:5,6 187:7,7,17 187:17</p>	<p>benzene 134:2</p> <p>best 22:1 29:12 45:2 72:19 130:5 150:7 153:12 171:19</p> <p>better 62:7 70:12 126:18</p> <p>beyond 12:19 19:1 27:12 47:19 60:12 60:20,20 123:21 124:22 133:11 147:23 148:11 160:20 182:7</p> <p>biggam 1:16 5:25</p> <p>bigger 170:23</p> <p>bill 4:11 15:12 143:12 147:3 158:12</p> <p>billing 3:13 28:13 28:19,22</p> <p>bilott 10:2 54:23</p> <p>bit 178:10</p> <p>blood 160:10</p> <p>blurred 91:11,11</p> <p>body 90:1,3</p> <p>bone 68:8</p> <p>borders 33:14</p> <p>born 71:22</p> <p>bottom 25:8 65:17 82:25 91:17 97:22 99:4 103:3,4 113:25 116:22 128:7 159:23</p> <p>breadth 142:11 143:2</p> <p>break 33:2 42:1,3 78:1 116:8,9,9 159:14 161:24 174:15</p> <p>breathing 141:20 142:8 157:20</p>	<p>bress 4:11 15:13 143:12 144:4,5,21 145:9 146:3,9 147:3,9 158:12</p> <p>brief 61:15 68:9</p> <p>briefly 35:14 119:3</p> <p>briefs 67:13</p> <p>bring 73:14</p> <p>broad 15:1 52:12 134:1 173:23</p> <p>broaden 148:2</p> <p>broader 113:19 144:14 176:20</p> <p>broadly 13:5</p> <p>brought 55:14 76:19,20 77:9</p> <p>bryant 2:9</p> <p>build 115:5</p> <p>built 97:18 99:1 104:6 105:2 169:16</p> <p>bump 20:6</p> <p>burden 110:24 136:4 176:24</p> <p>burst 23:16</p> <p>business 146:12</p> <p>c</p> <p>c 190:1,1</p> <p>caa 43:24 78:17 83:20</p> <p>cabinet 182:9</p> <p>california 35:20 36:3,7 37:1 150:5</p> <p>california's 36:5</p> <p>call 106:9</p> <p>called 10:3 40:11 63:20</p> <p>cap 37:11</p> <p>capacity 153:12</p>
---	---	--	---

capital 110:22 126:16,22 capriciously 115:18 capture 126:15 captured 178:15 career 61:2,9 careful 43:16,18 carefully 69:1,3 carry 25:9 111:16 116:23 159:21 160:3,4 carrying 25:8 cas 166:24 case 8:7 12:18 16:3,22,25 17:3 19:19 21:21 22:3 23:5 26:3 28:13 28:23 29:7,9 30:15 43:7 49:13 53:2 54:22 57:21 57:25 58:12,16 59:14 63:20 64:1 64:13 65:23 67:25 69:14 70:5 71:9 74:1 76:5 109:12 127:22 129:22 147:1 177:24 179:18 180:9 190:20 cases 11:5 12:12 12:21 15:19 67:18 71:23 122:11 catalytic 49:5 100:22 127:8,10 127:13 128:2 129:3 categorically 132:3,6 categories 108:24 133:23,23	category 30:23 46:11 cause 102:22 137:9 154:17,25 169:25 178:17 caused 161:1 172:14 176:11 179:22 180:2 184:16 185:21 causes 57:13 136:25 172:23 causing 72:14 101:20 cautious 34:23 caveat 92:17 cell 5:17 center 23:22 certain 22:5 27:25 37:5,24 40:12 91:8 95:5 97:7 109:15 119:12 122:6 126:1 certainly 17:18 18:14 50:9 61:4 62:1,19 71:3,17 77:4 91:8 113:18 127:1 142:13 153:6 167:18 187:8 certainty 173:3 182:3 certify 189:2,4 190:4,15 cetera 152:1,12 chain 158:7 159:16 challenge 73:14 75:25 76:21 133:6 challenged 77:17 challenges 74:1	champlain 13:4 change 135:17,19 changed 35:2 119:4 changes 19:4,7 chapman 20:6 22:4,6 40:6 characteristics 136:25 152:12 characterization 26:24 41:11 characterize 172:12 charge 28:25 29:4 74:20 116:3 charged 105:13 charging 76:9 check 99:22 chem 57:6 126:14 chemfab 3:21,22 27:6 31:25 44:20 45:5,17 46:4 47:23 49:18,19,20 53:9 54:16,17 55:8,15 56:8,25 57:7 63:23 65:4 65:11,18 69:16 70:16,19 71:9 72:2,18 73:9,19 74:17 76:9,20 78:21 79:1,17 80:2,8,13 83:20 84:1,23 85:24 86:7,11 88:10 89:20 90:9 92:3 92:15 93:10 94:3 94:16,17,25 95:2,4 96:4,8 97:16,24 99:5,25 100:6,11 101:25 102:7,10 102:24 103:6,9,15	103:24 106:1,17 110:11 112:25 114:1,19 123:21 124:15,20 125:19 126:21 129:8 130:7,9,16 131:20 131:21,24 132:14 153:1 154:22 155:1,9,15,23 156:18 157:1,21 160:7,16 165:4 166:2,4,8,23 167:13,24 168:1,1 168:6,9,15,17,25 170:15 171:6 172:8 173:9 174:9 175:6 176:15,23 176:25 179:18 180:9 181:15,19 182:4,22 183:2 186:4,23 187:6,13 188:3,6 chemfab's 22:12 22:19 32:11 70:9 79:18 80:16 84:5 88:3 99:13 104:10 104:25 107:14,18 127:22 130:11,15 133:4 144:4,21 145:5 163:13 169:3 175:25 178:7,21 186:15 186:23 187:11 chemical 4:11 59:4 70:10 71:1 133:21 136:24 138:25 139:2 143:19,21 152:12 169:24 170:10 172:23 177:10
--	---	---	--

chemicals 15:1 57:10 59:13,17,25 60:3,12 71:2,5,11 72:14 101:19 102:8,21 106:2 129:4,11,17 130:18 133:17,19 134:1,2,4 135:4 139:4 146:13 153:11 154:16 155:11,24 156:19 160:9 167:7 173:20,24 177:9 178:1,25 179:12 180:8 183:3,23 184:14,15 185:18 children 160:9 choose 130:17 chose 108:18 128:18 130:20 chris 3:22 27:4 75:8 109:21 114:13 166:19 176:5 chuck 4:13 40:13 40:15 158:8,17 159:24 chuck's 158:20 cigarettes 161:6 circumstances 9:4 75:24 112:21,22 circumstantial 172:13 citation 89:7 123:3 cite 79:9,12 139:25 cited 25:20 94:14 163:1 cites 89:9 citing 96:3 citizen 27:24 57:5	citizens 23:23 106:15 civil 1:6 5:5,23 58:19 190:12 claim 96:4 claimed 93:4 clarification 84:8 104:23 clarify 51:23 64:5 90:24 147:13 180:15 clarifying 107:24 class 1:4 9:17 40:9 40:10 54:23 190:10 classic 14:5 classroom 9:14,15 clean 13:3 30:18 30:18,20 31:9 32:18 33:3,12,17 34:9,19 35:12 37:24 38:6 59:14 65:6 78:13 79:2 79:10,16 80:9,10 81:7 84:7 90:17 90:21,25 92:20,21 147:16,16 153:8 184:11 cleaned 161:7 cleaner 127:17 cleanup 24:18 clear 11:24 46:2 52:3 55:2 64:4,5 70:6 71:9 74:10 75:1 79:20,23 80:1,24 84:9 85:18,23 86:20 90:7,14 91:9 96:25 106:16 107:9 115:10 117:22 121:7	122:25 124:4,7 129:20 130:16 135:5 144:8 168:20 174:2 176:18 182:16 185:8 clearly 46:3 88:18 102:7 115:22 119:5 131:23 135:1 179:5 clients 67:10,13,16 67:23 68:10 cliff 128:3 climate 13:15 clinic 23:21 close 174:14 179:17 closed 154:22 175:13 181:15 closely 145:20 closing 67:20 clues 54:13 55:7 coated 162:23 coating 89:23 90:5 97:18 98:1,16 100:7 107:19 164:22 collaboration 16:19 37:9 collaborative 37:3 collaboratively 76:6 colleague 20:4,5 colleagues 19:24 20:1,13,17 collected 164:11 collection 173:22 combination 57:4 combined 74:4 come 39:13 52:15 86:23 99:10,15	139:8 154:10 178:1 179:20 comes 129:1 139:22 141:8 comfort 161:10 coming 27:6 comm 190:25 commencing 1:17 190:9 commission 8:14 189:25 commissioned 125:19 commissioner 10:5 12:7 60:2 61:5 68:17 75:3 105:17 147:2 158:15 committed 103:24 105:20 common 34:2 131:15 173:17 communicate 57:13 communicated 75:1 communicating 106:5 communication 175:23 communications 22:22,25 72:18 102:10 176:8 181:23 182:9,13 community 18:16 21:15 22:23 23:23 48:14 58:13 59:11 60:3 70:25 71:23 companies 12:16 59:18 70:25 71:7 81:5 153:10
---	---	--	---

[companies - constitutes]

Page 9

173:14 174:4 177:8 company 56:10,18 58:13 59:8 60:25 63:5 64:8,13 66:6 66:20,21 70:2 72:6 74:5 76:6 95:9 96:1,10,14,25 107:7 108:13 109:21 110:24 111:18 112:25 123:22 129:23 149:7 151:1 153:22 168:22 169:12,24 174:7 175:12 176:11 177:24,25 179:9 179:16 180:1,13 183:8,11 184:24 185:22 company's 63:10 106:7 110:22 113:8 129:20 179:2 180:22 compilation 27:23 compile 66:15 compiled 53:21 67:6 69:3 complainants 76:16 complaining 121:13 complaint 48:7,9 49:8 75:15,16,21 120:20 121:19 complaints 27:24 45:18 46:10,18 47:15,24 48:2,4,6 48:20 49:13 52:2 57:4,5 71:10 74:3 74:14 76:15 77:13	102:6 106:3 117:4 117:4,6,8,11,16 121:6 122:14 156:21 complete 69:4 83:4 88:9 complex 101:8 complexity 122:11 compliance 22:12 45:22,25 69:15 70:24 80:8 86:17 93:8,11 95:10 96:15 131:21 179:6 complicated 176:20 complied 96:1 179:10 comply 97:24 component 52:9 52:23 168:2 compounds 101:11 102:21 143:23 comprehended 173:8 concentration 136:24 concern 43:14 53:15 59:5 60:12 66:22 102:5,18 152:13 160:14,22 161:5,16,21 concerned 106:6 143:21 146:10,15 160:7 164:20 concerning 4:4 25:11 concerns 12:1 24:14 47:19 101:18 130:18,21	153:14 161:19 165:5 166:8 167:23 168:12 176:10,12 181:23 concluded 188:19 concludes 188:14 conclusion 115:19 conclusions 66:16 concrete 124:12 condition 48:16 101:21 102:15 125:2 conditions 49:21 50:3 51:14 70:7 73:25 90:20 100:16,19,21,24 101:12,14,18,23 101:24 102:13 124:19 132:17 184:24 conduct 57:20 179:19 180:24 conducted 126:24 confidence 135:8 187:10 confident 144:12 185:23 confirm 120:24 confuses 87:21 88:14 confusing 88:3 confusion 90:14 129:2,9 connection 9:8,19 13:6 25:17 26:17 28:2,17 31:8 35:12 37:15 38:9 60:19 94:20 113:4 150:12 conscious 68:4	consent 187:12 consequence 58:21 conservation 10:6 34:22 44:6 74:25 147:11 164:19 conservative 34:24 consider 15:22 17:9,16,17 39:16 47:5,24 48:12,16 50:21 51:4 169:5 169:19 170:17 consideration 58:22 154:13 considerations 58:19 considered 18:1 38:16 59:6 104:9 107:3 139:9,13 152:16 164:15 considering 39:16 40:3,16 75:10 175:18 considers 141:19 142:1 consisted 11:3 consistent 35:4 121:17 consistently 46:23 131:25 consists 41:5 constituent 162:12 162:23 163:14 constituents 132:9 constitute 47:25 124:16 138:17 140:16 184:20 constitutes 117:11 152:7 172:22 173:4
--	--	---	---

[constrain - correct]

Page 10

constrain 122:8 construct 88:25 89:10,22 constructed 98:2 98:10,16,19 103:13 104:2 constructing 93:21 95:1 108:14 construction 88:19 89:17 91:6 91:14,20,24 92:2 92:10,14 93:1 97:17,24 99:24 103:7 104:1 105:8 107:2,13,19,20 108:5 110:20 111:1,6,13,25 112:17 113:9,9,10 114:8 115:4 construe 48:1 consumed 18:12 consuming 18:18 contact 19:23 114:23 contacted 111:20 contacting 141:21 contain 118:21 177:12 containing 164:10 contam 21:6 contaminant 39:6 40:17 59:5 60:8 78:18 91:21 126:18 135:23,25 136:18,21,21 137:8,8,23 138:3 138:14,17,19,21 139:10,14,18,21 139:24 142:15 145:20,23,25 147:5 151:3,15,23	151:23 152:7,7,21 152:21 153:7,23 154:7,14 156:17 169:4,6,17,20,21 170:18 contaminant's 140:15 contaminants 14:24 39:3,12 41:6 66:22 101:15 101:21 102:9,16 102:17 130:4,6 135:20 136:5 137:14 138:4,10 140:7,10 142:2 144:6,16,23 145:8 146:5 151:8 152:14 153:3 154:3,16 182:25 184:2 contaminated 178:5 179:12 contamination 20:24 21:7 23:19 106:23 145:5 179:8 180:11 187:6,9,16 188:2 contemporaneous 61:24 contention 80:5 context 17:23 39:17 47:21 58:25 60:6,11 70:22 90:7,14,16 104:17 113:19 115:23 147:12 176:20 contexts 17:20 186:15 contiguous 121:12 121:17 122:4	continuation 186:1 continue 69:18 86:11 125:11 180:10 continued 3:25 4:1 71:16 129:2 155:16 186:14,17 continues 45:8 88:4 137:16 continuing 84:24 123:1 124:5 continuous 95:11 106:3 contract 111:19 112:23 contrary 177:21 contribute 137:9 contributes 136:25 control 3:15 4:4,8 15:24 32:21 41:4 41:9 43:11,24 44:21 45:6 51:16 52:14 56:11,11 58:3 75:2 98:7 100:25 102:16 106:19 110:13 112:1 114:4 118:10 124:17 126:16 129:22 130:17 131:16 133:24 135:16 171:7 172:17,19 173:22 177:6 179:6 181:9 controls 36:25 69:20 70:14 71:19 72:10,10 125:14 131:24	conversation 22:8 27:8 39:15 54:10 150:3,15 155:21 conversations 5:17 21:3,20,24 22:10 23:4,11,15 23:17 24:2,10,24 112:24 cooperated 177:22 cooperates 36:19 cooperation 69:15 69:17 70:20 131:22 cooperatively 70:3 corner 82:25 corporation 1:8 3:22 143:20 188:17 190:12 corporation's 62:11 correct 8:15,16 9:1,2 10:7,8,11,15 18:22 19:6,9 30:20 31:7,14 33:18,21,22 35:24 37:25 38:3,5 43:7 43:8 44:22 45:1,9 45:12 50:14,18 52:24 53:11 55:4 55:5,24 56:1 58:25 59:1 65:12 67:1,7,8,10,23,24 69:9 72:20 73:6,7 73:21 75:14,17 76:24 77:2 79:7,8 82:10,11,14,15 87:5 91:25 92:1 93:2,3 94:1,2,22 94:23 97:13,14,19 100:1,11,12,15 103:16,21 104:3
--	--	--	---

[correct - dec's]

Page 11

104:12 105:3,4,7 105:10,14,15 107:20,21 109:19 113:6,23,24 114:19,20 117:9 119:16,17 120:10 120:13,17 121:6 124:17,18 127:6,7 127:24 128:10,11 131:4,10 133:4 134:20 136:7 137:6,20 140:7,8 140:12 144:23,24 145:10 146:6 148:19,20 150:13 152:9 153:3,24,25 154:3 165:14 166:5,6,19,20 167:4,14 169:17 169:18 172:6,7,16 179:15 187:14 correction 189:8 corrections 189:6 correctly 129:5 132:2 137:4,18 correspondence 45:20 61:21 63:3 corroborated 48:13 76:16 117:17 counsel 5:3,21 6:7 6:22 19:20 30:3 30:11 190:16,19 counted 47:14 counterfactual 157:6 country 20:7 54:7 couple 11:5 36:24 98:20 99:2 105:22 course 9:12,19 13:17 15:13 17:18	40:9 53:2 61:9 62:23 113:13 150:4 180:15 183:16 184:21 185:1 court 1:1,21 5:23 6:3,18 62:24 64:12 76:12 85:18 86:9,23 190:3 courts 67:15 cover 89:20 covered 14:25 cragin 158:18 created 72:12 creating 51:14 credence 51:22 credentials 44:16 credibility 47:13 112:21 criminal 58:19 criteria 31:16,18 32:3 35:11 37:14 37:17,21 44:15 49:7,14,22 50:2 52:1 60:15,18 61:17 70:1,20 109:4,11 120:18 120:19 121:6 122:16,20 152:6 173:24 critical 88:23 cross 20:7 crossed 147:2 crossing 161:19 crr 1:21 190:3,24 cupolas 46:13 curiosity 21:10 current 8:17 23:8 39:10 119:12 currently 156:3	curve 127:19 cutters 1:17 5:25 cv 1:6 5:24 8:9,11 8:12 9:9 19:1 190:13 d d 1:3 3:1 5:21 190:9 daily 13:22 danger 159:2 date 8:19 16:6 32:21 83:25 88:11 98:6 144:11 150:12 165:9 175:11 181:18 dated 30:6 55:24 123:4 158:20 159:17 164:25 dates 20:25 dating 71:23 daubert 62:20 david 1:13 2:8 3:3 3:10,13 5:20 6:13 7:1 188:15 189:2 189:21 190:7 david.weinraub 2:10 day 117:17 121:9 121:18 154:1 174:17 184:21 189:23 days 115:11 121:22 de 178:22 dead 99:8 deadline 80:17 deadlines 86:10 deal 14:24 101:9 133:22 dealt 170:23	dean 64:9 deb 13:25 14:2 dec 10:14,18 12:22 13:13,21 14:2,14 19:23 20:13 30:7 36:15 38:19 39:11 45:17,19 48:18,22 49:3,17 50:5 51:15 55:4 58:6 60:2 61:4 68:18 72:19 75:3 77:20 78:24 80:21 84:15 84:18,20,25 87:23 89:21 90:4 99:5 100:10,13 102:1,7 102:10,24 103:12 103:15 104:4,9,14 105:2,5,8,13,16,19 106:13 107:3,12 108:3,9,19,22 109:10 112:4 113:15,22 114:6 115:1,14,17 118:3 122:7 126:23 146:23 147:3 149:6,18 150:24 153:19 154:6 155:3 156:4 157:7 157:17 160:13 163:10,13 165:1,6 165:10,13,20,20 165:22,23 166:8 167:8,13,22,25 168:8,11,12,16 170:12 173:14,14 174:3,3 175:5,23 175:24 181:18 182:4,10 186:24 dec's 89:20 90:9 103:5 105:11 165:4 166:8
---	---	---	---

167:22 decade 37:8 decades 59:19 december 10:9 dechert 2:8 6:14 dechert.com 2:10 decide 159:12 decided 183:24 deciding 108:23 decision 73:14,23 85:12 114:24 115:24 179:17 183:10 decisions 12:4 24:18 177:12 deem 119:22 120:16 deemed 119:14 140:16 deeper 153:14 deeply 141:2 default 59:12 defendant 1:8,16 2:7 5:21 6:14 74:1 75:23 defendant's 25:11 deference 51:11 51:18 deferred 73:3 defined 57:24,25 defines 151:22 definitely 13:10 49:20 102:4 124:12 148:13 definition 60:7 118:22,25 119:9 119:10,14,24 136:5,13,16,17,20 137:6,7,11,16,17 137:21 140:5,14 140:20 142:15	145:19 151:14 152:22 154:15 169:6,17 170:18 182:25 definitions 59:25 definitively 135:6 degree 105:24 109:6 132:25 133:9,15 173:3,7 182:3 degrees 127:23 128:3,9,12,13,15 128:18 131:6,7 132:12,13,22 135:9,9 delay 81:19 deliberate 113:13 delivered 67:20 demeanor 63:1 demonstrate 184:3 demonstrated 49:15 department 7:21 10:6 11:22 12:8 14:16,20 15:2,10 21:14 34:22,23 68:17 74:25 75:5 85:25 105:23 143:15 147:10 149:23 151:1 153:7,21 155:13 158:11,16,19 164:19 165:8 168:21 169:2 173:8 176:14 177:11 department's 73:14,23 departure 9:4 186:15,24	depend 151:6 169:4 depending 31:17 33:10 62:5 81:9 116:9 depends 57:23 59:7 119:18 183:4 183:5 depo 180:16 deponent 189:1 deposited 188:7 deposition 1:12 5:4,7,9,20,24 7:7 8:2 26:10 28:7 29:1,16,19,22 30:4 40:23 55:20 81:15 82:21 87:15 89:13 109:24 118:6 123:8 126:6 136:10 141:5 143:6 145:15 158:1 159:9 160:19 163:5,19 166:13 188:19 190:7 depositions 7:9,14 7:18,19,22 dereliction 182:12 182:15 describe 9:3 11:2 11:19 13:1 36:17 45:14 51:21 52:12 58:11 66:15 described 49:21 85:2,10 122:10 173:23 describes 88:24 89:22 describing 27:8 87:22 112:11	description 3:10 4:3 164:7 design 129:18 designate 169:10 designated 46:17 47:6 designed 133:19 133:21,22 desk 147:2 despite 92:25 162:10,18,21 destroy 133:24 destruction 127:16 details 24:22 34:13 determination 49:11 50:6,9 104:5 170:3 determinations 48:19,23 49:4 50:10,11 51:19,23 58:7 61:5,6,12,13 62:8 63:17 73:5 153:16 determine 25:16 44:8 47:7 49:14 63:4 80:19 102:8 120:21 121:23 123:20 148:4 153:12 156:15 184:25 determined 27:14 155:12 178:6 188:2 determining 49:8 49:23 58:17 62:22 70:1 109:11 121:14 122:16,16 142:24
--	---	--	--

[developed - drafted]

Page 13

developed 55:3 62:2 122:7 developer 58:14 developing 33:13 81:25 development 37:8 175:19 deviations 128:14 dialogue 149:23 dick 13:14,16 46:12 75:9 176:6 differ 31:19 68:9 difference 91:5 128:4 132:25 135:10 184:8 different 18:25 28:25 29:4 55:19 65:4 70:10 76:16 90:17 121:21 125:14 129:13,13 168:17 171:6 183:13 187:8 differently 91:4 116:2 difficult 73:25 75:13,19 77:5 184:8 dig 153:14 dilution 70:15 dioxide 173:25 direct 12:9 61:7 directed 146:22 directing 100:10 directly 49:16 114:18 director 8:21 11:13 13:14,17 19:22 disagree 26:23 52:15 73:8 108:8	disagreed 27:10 113:5 disagreement 129:9 152:17 disapprove 82:5 82:13 discharge 124:21 178:16 183:17 discharger 183:18 discharges 180:5 disclose 94:17 disclosed 155:1 183:8 disclosure 177:16 disclosures 95:6 discontinuance 46:3 94:7,10 96:13,25 97:10,12 185:14 discourse 54:19 discretion 52:4,6 60:14 73:6 105:11 115:14 discretionary 51:18,21,24 discuss 14:1 30:17 135:19 discussed 9:13 19:19 20:12,19 23:3,7 24:10 35:11 37:15 52:22 52:23,25 95:20 97:23 102:24 158:8 discussing 14:11 63:8 129:8 discussion 15:6 30:2 40:9 54:19 78:12 149:12 discussions 9:14 9:15 15:2,8 20:22	30:3 39:10 161:12 175:17,19 dispersion 162:23 163:15 dispute 83:7,16,19 83:23,24 112:14 163:12 disrespectful 157:15 distilleries 14:7 distillery 14:4 distinct 49:24 50:1 90:23 117:11 120:21 distinction 25:24 distinctly 91:9 distinguish 31:9 32:8 45:23 distinguishes 88:19 distinguishing 142:7 distribute 9:18,20 distributed 12:25 district 1:1,1 5:23 5:23 division 13:15,18 111:20 158:17 division's 126:12 document 8:5 26:13 27:21 28:2 28:10,16,19 29:6 41:12 55:25 110:5 126:9 127:2 143:9 143:10,11 146:25 158:5,25 161:11 163:22,24 166:16 documentation 63:2 109:16 documented 46:4 116:24	documents 25:12 25:16,20,21,25 27:11,15,18,22 29:23 30:1 42:24 50:13,16 62:1 63:3,9 66:3,5,14 66:17,19 67:6 69:2 98:22 122:7 125:21 160:19 163:1 167:21 175:17 doing 12:5 14:24 67:22 71:24 73:20 128:19 142:6 double 99:22 doubt 152:22 154:13 doubting 112:8,10 doud 1:20 6:2 downstream 140:17 dozen 11:1,3 20:16 dr 18:3 19:10,15 23:3 25:10,16 26:2,16,19,22 27:5 27:12,14,17,20 43:6,9,13 53:12,21 55:23 56:6 57:17 65:10,17,22 66:13 66:25 67:5 69:3 79:5,9 97:23 108:4 117:7,19 122:19 144:5,21 145:9 146:3,9 147:9 162:6 163:5 171:5,10 draft 16:18,19 68:9 drafted 62:2 67:12 114:13
--	---	---	--

dramatically 13:4 draw 66:5 drawer 2:3 drawing 146:12 drew 50:19 drinking 15:5 18:12,18 39:18 59:24 147:16 148:19 drop 133:16 due 139:2 duly 7:2 190:7,13 dupont 54:7 125:24 126:1,4 155:9 duration 109:6 137:15 140:11 duties 183:2 duty 95:22 182:23	175:19 economically 69:19 effect 14:7 81:3 121:5 128:15 131:13 132:21 133:11 135:2,6,7 136:1 161:15 effective 71:6 98:6 125:8 130:23 131:2 effectively 135:1 184:18 effectiveness 11:23 127:20 128:2,20 132:25 133:11 effects 140:17 141:20 142:24 147:20 157:2 160:8 efficacy 127:14 128:5 133:17 efficiency 11:23 37:11,13 effort 68:4 125:10 efforts 21:15 70:6 eight 29:14 either 18:8 32:7 37:20 39:17 47:12 48:10 61:10 110:12 116:8 129:18 ejoselson 2:4 elaine 13:16 elected 106:5 electric 37:5 electronic 9:21 electrostatic 171:11,23 172:6 173:15 174:8	elements 109:18 elevating 11:13 eliminate 74:14 embedded 32:24 embraced 72:11 emerge 54:24 emerged 20:24 emerging 14:25 66:22 emily 2:2 6:16 emission 63:24 122:23 131:9 137:24 154:24 164:20 172:21,23 173:10 177:23 178:16 184:13 185:15 emissions 35:21 37:2,12 38:7 46:13 48:1,15,24 48:25 49:1,2 53:15 54:15 56:9 56:11 59:6 72:9 72:13 76:4 101:1 101:14,17 102:9 105:25 106:18 123:1 124:4,8 126:15,23 127:17 128:24 129:16 130:15 132:4,14 133:4 134:9,23 135:10 142:25 143:21 144:4,10 144:21 145:5,6 147:4 149:7,11,19 150:12 154:6,21 155:2 156:5 162:11,22 166:9 167:13,23,24 168:1,3,12,16,18 170:16 171:8,17	172:2 174:5,10 175:6,25 178:21 180:4 181:14,20 182:5 183:3 184:3 184:16 185:21 186:3,13 emitted 137:25 149:20 168:8 179:11 186:14,17 emitter 183:17 emitting 65:19 123:21 124:7 150:25 153:20 170:9 177:5 186:23 employed 8:25 190:16,19 employee 190:19 employees 49:20 57:8 71:12 106:2 156:20 157:2 employment 18:10 19:3,5 enactment 82:2 encapsulation 120:6 184:4 encompass 15:3 encouraging 10:23 11:19 ended 60:1 endedness 122:8 ends 78:23 164:14 enforcement 10:17,22,24 11:3 11:19,22 12:4,13 24:19 42:20 44:3 44:5,8,14,16 45:19 50:10 58:16,24 61:7 63:18 71:14 71:25 73:9,15 74:8,16 76:9,25
e			
e 3:1,8 4:1,13,14 19:13 30:11 143:18 148:7 158:7,20 159:16 159:17,23 161:14 190:1,1 earlier 21:21 49:11 73:3 76:14 77:11 80:4 97:11 113:4 122:10 143:16 154:15 158:8,12 168:7 175:15,18 176:23 186:2 early 16:7 54:21 57:6,6 81:4 98:21 99:1 174:17 easiest 121:10 easy 75:23 economic 108:25 109:18,22 110:23			

[enforcement - exhibits]

Page 15

77:8 97:2,4 104:14 122:13 142:23 engage 24:7 95:17 156:13 engaged 37:4 148:2 149:12 150:3 engagement 72:8 106:5 engaging 64:24 156:3 engineering 16:1 53:1,4 ensure 32:19,20 33:7 ensuring 31:3 entered 43:3 entire 90:24 129:7 153:8 entirely 53:6 entities 60:23 156:14 entitled 90:19 entity 61:19 142:6 169:13 188:6 entry 30:6 environment 58:15 60:5 105:14 106:14 144:19 152:15,18 162:11 162:22 178:18,19 179:13,22 182:19 182:21 184:13 environmental 10:6 15:23,25 21:6 23:20 34:22 35:6 44:9 49:18 52:18 59:17 70:24 74:25 143:14 147:10 156:10	163:3,9 164:19 172:24 184:2,16 185:20 epa 33:21 34:3,25 36:5 37:20 38:6 38:10,15,20,23 44:3,7,15 54:24,25 60:14 82:4,4,6,9 82:13,17 83:10,13 142:12,23 143:3 149:2 150:3 156:14 epa's 38:12,17 140:24 141:9,12 141:25 142:18 epa.gov 4:10 equipment 90:5 102:16 106:19 110:20 111:10 126:16 129:22 130:17 131:16 132:20,24 133:24 135:16 173:22 erroneously 87:22 error 27:8 70:17 escaped 172:14 escapes 14:6 especially 160:8 esquire 2:2,8 essence 184:7 essentially 52:21 56:16 64:20 120:3 186:3 establish 76:11 established 77:8 establishes 30:21 81:25 esteem 182:11 estimate 29:13 117:13	et 1:3 4:13 152:1 152:12 190:10 ethanol 14:6 etter 4:6,17 123:4 124:2 166:19 167:5 170:22 176:5 etter's 166:22 170:14,14 181:14 181:19 european 150:6 evaluate 145:8 149:19 evaluated 147:4 evaluating 43:16 63:13 70:10 144:3 144:21 evaluation 171:4 evenly 12:24 events 20:6,8 eventual 138:20 evidence 48:5,12 48:17 50:25 51:2 70:6 71:9 76:22 96:9 97:8 110:11 172:13 178:8,22 evident 47:16 94:6 132:7 evolution 53:22 exactly 14:9 129:20 160:23 examination 3:3,4 3:4,5 7:3 175:1 180:20 187:3 example 34:20 35:10 60:9 61:3 121:18 131:23 139:11 examples 60:10 exceedances 122:24	exception 187:20 189:6 excerpt 3:19 41:3 41:5 exchange 96:8 130:8 165:9 exchanges 45:17 54:5,9,24 102:7 167:20 excuse 103:6 exempt 95:4 exempted 93:2,15 exercise 179:3 exh 3:10,12,13,15 3:16,18,19,20,21 3:22 4:3,5,7,8,10 4:11,13,14,16,17 exhibit 8:2,6,9 16:14,22 26:9,10 26:14 28:5,7,11 30:6 40:22,23 41:3,23 55:19,20 55:23 65:16 69:7 69:8 81:14,15 82:20,21,24 87:14 87:15 88:8 89:12 89:13,16,20 99:8 99:19,22 109:23 109:24 110:2 118:5,6,9,17 123:7 123:8,13,17 124:23 125:2 126:5,6 136:9,10 136:15 141:4,5 143:4,6 151:19 157:25 158:1 159:8,9,13 162:7 163:18,19 166:12 166:13 175:4,12 exhibits 4:18
--	--	--	---

[existing - filed]

Page 16

existing 30:24 exists 119:10 141:3 expand 60:14 expect 29:3 182:17 expenditures 72:2 126:16 expensive 74:2 experience 8:12 8:13 17:19 36:13 42:25 43:14,24 51:25 52:16 53:5 57:19 58:11 64:22 66:14,25 67:3 70:23 71:22 115:6 139:3 146:9 experienced 48:14 64:1 expert 3:10 8:1,6 15:18,25 16:3,11 16:15 18:22 21:21 22:2 50:11 62:12 62:20 63:13,15 64:1,12,17 65:2 66:5,10 68:1 71:21 75:22 132:10,22 133:12 expert's 64:7 expertise 15:22 53:7 66:1 133:13 135:15 177:7 experts 23:4 30:12 51:1,16 61:21 63:8 133:10 expires 189:25 190:25 explain 66:15 73:17 178:9 explained 77:11 explaining 24:3,17 109:17	explanation 112:4 113:22 176:17 186:9 explicitly 169:16 explored 184:21 exposed 119:15 121:1,9,22 141:22 157:19 160:15,25 exposure 57:7 138:9 147:6 150:2 155:11 157:3 161:3,8,16 exposures 138:4 148:11 expressed 160:22 180:15 extensive 102:12 155:16 extent 50:8 65:1 85:9 88:3 109:6 131:5 132:7 155:16 external 169:13	fact 18:25 27:7 28:22 47:14 58:9 61:14,16,17,22 74:4 75:15 76:15 76:18 79:9 94:6 95:14 96:23 97:9 105:1 108:15 111:13 113:9 114:15 116:1 139:7 156:18 170:7 180:5 184:14 186:12 facto 178:22 factor 186:12 factors 108:22,24 facts 47:11 50:17 50:19 51:6 57:3 61:19,25 66:11 70:19 98:18 103:20 115:23 172:15 fahrenheit 127:24 128:10,18 131:6,7 133:16 135:9 failed 56:10 97:24 182:16,22 failure 57:11 85:13 97:8 103:7 108:4,13 127:5 168:24 172:18 177:18 183:15 fair 7:25 11:10 15:9 33:1 34:1 40:14 57:18 84:4 92:2,5 96:17 129:2,9 141:25 144:3 155:8 161:13 184:4 185:3 186:6 fairly 13:5 20:6 24:16 90:7 98:19	fall 9:12 131:6 falls 128:2 138:15 familiar 7:13 34:13 35:17 41:8 49:7 50:2 60:22 62:10,19 63:7 64:3,10 118:24 125:18,20,21 140:24 141:2 158:9 171:5 177:8 familiarity 42:18 42:22 families 134:4 family 121:2 134:1 135:3 far 39:7 84:22 120:7,8 154:4 166:11 167:17 fault 89:5 feature 35:8 features 34:2,7 february 8:14 123:4,13 158:20 federal 3:18,19 5:5 33:19 43:24 79:24 84:9 86:21 87:10 184:12 feel 12:6 123:11 139:16 felix 3:20 16:12 56:5 felt 176:3 fewer 11:1,3 120:9 field 15:22 fields 15:22 figure 57:12 147:24 file 3:22 4:5,17 165:6 filed 5:22 16:12 54:23 103:15
	f 190:1 fab 126:14 fabric 111:19 162:24 fabrics 4:11 143:19 facilities 14:9 79:22 99:13,25 107:14 186:22 facility 32:1,1,6,12 32:16 90:24 92:4 92:16 93:14 98:3 106:3 111:3 122:2 124:14 134:22 173:18 185:10,25 188:4		

[filed - further]

Page 17

104:7 files 165:1 fill 111:19 filling 158:22 final 46:11 56:3 84:14,18,20 88:9 126:12 166:21 finalized 19:16 finally 97:25 financially 6:5 190:20 find 72:15 75:1 76:6 93:17 97:21 106:24 125:12 150:21 finding 60:25 123:20 findings 61:14,16 61:17,22 123:19 185:13 fine 42:5 73:1 78:1 107:22,23 116:8 fined 73:19 finer 37:19 fines 73:15 firm 6:2 first 7:2 23:18 43:21 45:8 54:3,9 63:25 71:24 82:24 91:15 98:9,13 99:24 108:2 110:9 124:8 135:21,24 136:13 141:10 147:17 150:23 153:10,18 159:23 162:9,17 165:3 168:20,23 170:24 180:19 190:7 five 69:12 flags 155:13	flechas 3:20 16:12 16:16 18:3 42:18 42:22 43:21,23 44:2 47:22 52:12 56:5,7 63:21 64:19 65:1,9,15 69:1 80:7,11 85:24 86:4,16 87:13,21 88:7,18 88:24 90:8 91:3 93:4,7,13 95:7,9 95:20,25 131:19 173:7 177:21 flip 56:16 florida 7:22 flow 66:16 flurry 98:25 focus 12:23 15:24 31:2 44:5 56:3 91:15 101:12 102:5 148:11 180:12 focused 37:1 105:24 129:15 146:4 173:6 focuses 36:1 focusing 34:17 91:23 107:1 124:9 144:5,22 148:7 folks 13:11,18 20:9,9 22:2 23:1 147:10 158:16 171:1 follow 180:18 followed 168:22 following 13:16 154:11 follows 7:2 88:22 163:2 foregoing 189:3 190:4	forensic 56:24 form 5:6 11:15 22:15 32:22 36:21 40:19 44:11 47:9 51:8 53:3 56:20 57:22 63:11 65:13 66:7,11 68:11,16 72:22 73:11 74:22 76:13 85:21 86:13 87:1,8 90:11 102:3 104:16 107:5,15 113:16 121:25 125:9 134:11 138:22 140:19 142:20 144:7 145:16 146:7 148:10 151:9 152:24 155:5 156:6 157:10,22 160:17 166:10 168:4 171:20,21 175:10 176:1 177:2 178:11 179:14,24 182:14 186:19,25 formal 45:19 46:5 73:8 76:8 formally 46:16 formed 69:5 former 19:24 20:13 23:8 39:11 64:9,9 formerly 142:3 forming 17:6 68:13 forth 16:25 176:15 forward 22:23 111:18 170:25 176:12,16 179:20 fostering 14:8	found 69:4,18 83:4 139:6 165:1 178:20 four 120:11,14 fox 1:17 5:25 frame 12:15 105:23 112:18 120:25 framework 24:4 52:13 frankly 63:25 free 123:11 frequent 76:15 frequently 20:6 58:12 59:12 75:25 122:12 friday's 158:22 friend 20:4,5 front 61:10 100:3 100:5 fulfill 57:11 106:13 108:18 182:17 fulfilled 112:24 168:25 178:23,25 full 8:23 47:22 80:8 81:20 95:9 96:15 108:2 110:9 131:21 145:7 162:9,17 185:11 fully 72:11 97:1 183:8 fume 126:15 fumes 157:9,19,20 fundamentally 152:13 funds 37:13 further 74:12 91:19 126:23 136:3 150:10 172:4 174:23
---	--	---	--

[further - hazardous]

Page 18

187:2 188:12 189:4 190:15,18 furthermore 69:13 future 167:6 fuzzy 24:11	111:21 115:9,11 154:10,13 176:7 179:2,7 185:23 188:15 gives 183:16 giving 72:1 77:14 glowing 145:14,17 go 7:25 20:8 35:13 60:12 98:21 116:11 117:15 131:18 151:13 174:15,17 176:11 goal 33:8 184:22 goals 178:13 gobain 1:7 5:22 6:15 21:18 42:24 44:20 45:5 53:9 56:8 65:12,18 69:16 70:17 73:9 73:19 74:17 76:10 76:21 150:24 153:1,20 155:1 171:6 172:9 175:6 179:18 180:9 190:11 gobain's 22:12 178:21 goes 61:2 101:18 111:13 115:8 160:20 167:5 going 29:25 40:12 42:1,8 56:23 57:15 68:25 78:4 116:12 132:21 139:16 159:11 161:25 174:18 177:5 184:10 good 5:14 6:13 7:5 7:6 17:13 60:9 104:23 116:7 120:7,8	government 63:16 75:5 governor 112:25 114:23 181:24 governor's 75:4 176:9 governors 12:11 grammar 56:21 grant 51:18 granted 78:24 83:13,17 84:15 86:8 100:18 granting 90:4 grave 111:7 gravity 58:18 109:2,3,18 110:16 111:8 112:5 113:5 116:2 great 42:6 78:2 176:5,17 greater 54:25 131:14 150:4 greenhouse 36:11 37:2,10,12 grew 160:9 ground 7:14 73:5 grounded 57:2 groundwater 21:6 23:19 138:16,21 139:2 140:18 145:3 148:19 161:21 180:3 188:3 group 36:25 grow 14:8 growing 155:7 guess 70:22 73:22 guidance 122:7 173:9 guideline 135:23	guy 81:20 gwc 190:13 h h 3:8 4:1 hac 41:19 169:15 half 11:1,3 45:9 halfway 81:24 162:9,17 hampshire 69:20 hand 82:25 handful 36:8 hands 161:7 hang 158:25 happen 24:6 185:2 happened 23:17 39:9 54:6 63:4 64:2 157:6 176:13 176:14 happening 150:15 happens 139:3 happy 41:25 77:25 hard 10:21 77:12 101:7 113:1 harm 109:5 138:1 138:6,14 154:25 172:24 178:17,19 179:22 180:2,7 183:19 184:17 186:1 harmful 139:1,1 184:1,14 harms 138:9,24 185:20 harold 4:7,11 146:21 176:6 haste 113:2 hazard 143:22 148:15,16,22 149:3,16 152:9,10 hazardous 9:12 24:17 38:4,7,10,13
g gail 159:24 gap 177:17 garabedian 4:7,11 146:21 176:6 gas 37:2,10,12 gases 36:11 general 9:3 11:4,5 14:22 21:18,25 24:16 29:21 30:19 34:21 58:1 59:14 95:8,25 97:16 161:12 164:7 171:15 187:25 general's 11:7 generally 7:13,19 11:2 13:11 14:23 21:5 24:20 34:10 34:23 39:20,23 44:18,24 49:10 50:2 51:18 99:12 100:25 101:7,25 118:24 125:18 126:21 133:1 141:1 171:25 geographic 31:12 getting 33:2 92:8 115:5 139:16 give 10:21 34:20 47:12 51:10,22 54:1 63:9 108:13 139:11 given 7:7 25:19 36:6 54:16 55:8 67:15 87:9 105:1			

38:17,20,24 39:3,6 39:12,18 40:17 41:6 52:14,19 59:24,25 60:7,20 126:17 135:20,22 135:25 136:4,17 136:20 137:8 138:3,17,21 139:9 139:12,13,24 142:15,18 143:23 144:6,22 145:20 145:23 147:4,16 151:2,8,15,22 152:7,13,21 153:3 153:23 154:2,7,14 156:17 164:15 169:3,6,17,20,21 170:18 182:24 186:10 hazards 137:22 138:19 139:14 141:21 142:1,2 145:24 146:4 147:5 148:18 head 13:10 15:16 23:20 26:25 34:10 75:2 93:6 98:8,11 113:7 117:18 140:4 165:12 168:14 heading 8:12 42:17 43:22 45:3 53:14 56:4 65:18 69:11 78:11 83:1 84:13 135:22,24 141:10,17,18 164:7 health 14:16,20 15:3,10 34:23,25 57:9 58:16 59:16 60:4 105:14	106:14 109:5 137:15,21 141:20 143:15 146:11,16 147:21 149:24 152:8,10,14,18 154:12,12,25 155:3,10,10,13 156:10,12,20 157:2 158:11,18 160:8 161:1 169:25 172:15,24 178:17,19 182:18 182:20 184:13,16 185:20 heard 12:15 21:16 62:15 176:12 heavily 130:6 held 5:25 helpful 53:4 73:17 86:9,14 hesitate 119:3 hesitating 172:11 high 145:3 182:11 187:10 higher 127:15 131:14 highlights 54:2 highly 143:16 145:10,17 hindsight 106:17 106:25 168:21 historical 61:23 history 19:4,5 22:19 43:10 55:3 108:12 109:8 178:15 hlvs 143:22 hoc 113:18 hold 73:15 182:11 holding 62:11 164:12	hole 139:17 homes 18:15 honestly 40:5 hope 70:16 142:21 hopke 3:12,17 19:10,15 23:3 25:17 26:2,23 27:12,14,17,20 43:9 50:13 53:12 53:21 56:6 57:17 65:10 66:25 67:5 69:3 79:5 95:7 97:23 108:4 117:7 117:19 171:10 hopke's 18:3 25:10 26:16,19 27:5 43:6,13 55:23 65:17,22 66:13 79:9 122:19 162:6,15 163:5 171:5 horribly 174:16 hour 28:20 30:7 42:4 159:12 178:4 hours 29:12,14 household 120:12 121:3 hum 159:25 human 105:14 137:15 152:14 154:12 169:25 182:20 hundred 117:3 125:7 hundreds 178:5 husky 12:19 hydrogeology 22:22	i i.e. 82:2 ibm 12:19 idea 71:17 177:14 identification 8:3 26:11 28:8 40:24 55:21 81:16 82:22 87:16 89:14 109:25 118:7 123:9 126:7 136:11 141:6 143:7 158:2 159:10 163:20 166:14 identified 17:14 37:17,20 45:11 46:17,17 50:13,17 50:21 59:4,13 72:9 106:17 117:7 153:2 155:23 162:12,22 163:25 168:18 179:1 183:22 187:6,15 187:18 188:5 identifies 47:13 160:1 170:5 identify 25:21 34:7 35:7,10 51:3 60:3 71:6 72:12 72:13 79:5 94:15 94:24 130:4,12 136:4 153:13 166:24 169:1 177:4,25 182:23 185:6 identifying 71:5 154:7 ignores 141:21 illness 137:4 152:3 illnesses 154:18
---	--	---	--

immediate 61:8 immediately 187:9 impact 58:15 132:13 133:3,7,8 134:8,22 138:16 impacted 187:18 impacts 57:7,10 71:11 77:22 106:2 106:6 143:19 146:11,15 152:14 152:15 154:12 155:11 156:20 161:1 172:15 implementation 33:13,16,20 34:14 37:6 52:17 81:10 153:9 implemented 92:22 106:20 142:12 184:18 implementing 36:20 82:1 147:12 implication 62:6,9 127:1 implied 157:11 implies 96:18 133:16 imply 96:22 importance 71:4 important 31:14 47:21 48:5 63:2 90:13,23 impose 104:12 105:5 108:23 imposed 73:1 108:3,9 113:22 imposing 108:20 impression 27:23 44:4 86:24 93:9 114:14	impressive 15:17 improve 11:23 improvements 126:22 improving 126:15 inadequate 115:2 131:24 inappropriate 64:25 incapacitating 137:3 incidentally 129:18 incineration 186:18,21 include 35:22 38:20,24 50:3 59:25 60:1 138:6 178:15 included 4:18 41:19 65:8 99:12 100:21 156:16 163:14 includes 30:6 including 11:22 35:20 41:4,4 50:25 109:4 160:23 173:24 179:12 inclusion 38:17 inclusive 190:5 inconsistent 64:22 incorrect 86:1 increase 137:2,2 154:17 increased 152:2 157:9,19 independent 12:1 27:21,25 28:1 53:3	independently 169:1 indicated 46:18 47:11 86:16 96:9 160:14 indication 76:18 107:3,11 177:20 indications 75:7 indicators 76:3 individual 48:7 individually 1:4 190:10 individuals 22:11 indoor 141:21 industrial 173:18 186:15 188:6 industry 61:18 69:15 176:25 177:10 ineffective 132:3 infectious 136:25 inferences 50:19 50:24 51:7 66:5 inferring 70:18 inform 17:20 86:9 142:18 180:24 informal 167:20 informally 176:14 information 17:24 17:25 18:1 20:23 23:18 51:12 53:11 53:21 57:5 59:16 61:20 65:7 68:20 68:24 69:3 76:14 80:19,23 87:10 93:22 94:16,21,25 95:18,22 96:11 97:1,4,9 104:4 107:14 115:23 127:3 142:22 146:18 148:5	150:8 154:10 155:4,8,22 156:11 156:23 157:1 165:3 166:1,7 170:13 179:20 181:20 183:22 187:23,25 informed 17:24 75:22 77:19 109:3 150:24 151:10 153:20 156:5,8 163:13 165:4 168:11 informing 85:18 ingesting 141:21 inhalation 142:1 159:2 160:15 161:2,16 inhaled 142:25 157:8 inhaling 160:7 inherently 184:3 initially 15:12 92:15 initiate 104:14 105:2 initiative 37:10 injunctive 74:11 injurious 137:15 140:11,16 injury 140:21,22 inquiry 148:3 inspection 4:16 45:18 46:8,18,19 47:7 77:20 123:3 123:14,22,24 131:7 164:5 inspections 61:10 75:7 77:20 107:6 122:25 128:8
---	---	--	--

[inspector - june]

Page 21

inspector 44:16 47:12 48:11 inspectors 44:8,13 45:19 49:17 51:15 61:7,11 75:23 76:17 77:20 install 72:10 90:4 100:6,11 125:13 172:19 installation 91:20 installed 100:10 100:14 installing 111:22 instance 68:17 75:7 121:6 139:23 147:8 148:1 153:10 159:7 185:22 integrity 109:7 114:3,7 115:8 intend 16:24 115:21 157:14 intended 115:22 129:12 130:14 133:18 134:5 143:2 intent 62:11 111:12 intention 90:12 interact 13:19 14:13,19 20:5 114:18 interaction 180:12 interactions 22:19 147:17 interested 6:5 114:24 190:20 interesting 64:18 interfered 12:13 interference 5:18	interim 50:23 83:13 126:13 internal 71:11 165:13,22 interpretation 68:23 140:1 142:11,14 145:21 145:22 interpretations 51:2,11 interrupt 156:24 intersected 68:14 introductory 88:2 investigated 59:5 investigation 27:25 74:12 investment 37:10 110:22 112:23 investments 37:13 inviting 24:13 involve 59:23 176:9 involved 10:16 11:5,8,14,18 12:16 25:2 62:8 64:1 70:24 148:2 150:17 involvement 10:22 10:25 43:10 involves 30:23 involving 13:3 14:4 54:22 158:7 182:9 irreversible 137:3 154:18 isolated 48:9 issuance 110:12 issue 13:9 14:4,5,6 73:13 170:23 186:7	issued 26:2 79:14 85:25 87:22 94:7 99:25 105:8 186:10 issues 9:9 10:13 13:3 14:1,12,17,23 15:1 17:19,22 20:11,12 21:6,7 23:1,7 24:25 25:18,22,23 55:13 65:7 66:9 70:24 72:3,20 73:1,21 101:15,24,25 105:3,6 128:25 165:10 180:25 181:23 issuing 44:15 j j 2:2 j.d. 3:11 james 1:3 5:21 190:9 jersey 7:22 job 8:14 43:16 49:19 johanna 1:21 6:3 190:3,24 john 20:7 21:11,12 40:12 joined 35:19 36:10 jonathan 4:7 jones 3:22 27:4,6,7 75:8 109:21 114:1 114:13,17 166:19 176:5 joselson 2:2 3:4,5 6:16,16,24 11:15 22:15 32:22 36:21 40:19 42:3 44:11 47:9 51:8 56:20 57:22 63:11 64:14	65:13 66:7 68:11 69:8 72:22 73:11 74:22 76:13 77:10 77:18 78:2 85:21 86:13 87:1,8 90:11 91:7 95:23 96:6,21 99:19 102:3 104:16 107:5,15 113:16 114:10 116:11 118:14 121:25 125:9 126:25 131:11 132:15 133:5 134:10,13 134:24 135:11 138:22 140:19 142:20 144:7 145:16 146:7 147:7 148:10 151:9,19 152:24 153:4 155:5 156:6 157:10,22 159:11 160:17 166:10 167:15 168:4 169:8,23 170:19 175:2 182:6,14 186:5,19,25 187:4 188:10 judge 75:20 judges 152:8 judging 68:21 judgment 73:4 75:22,22 136:23 150:7 151:6,25 169:16 july 10:9 30:6,7 164:5 jumping 151:13 june 9:7 16:7 83:5 99:4,11 163:2
---	---	---	---

jurisdiction 57:24 jurisdictional 147:24 jurisdictions 7:17 justice 7:22	97:11 98:8 109:10 109:15 115:20 117:19 119:8 121:2,11 127:10 127:22 128:2,4 131:12 132:9,20 132:23,24 133:19 134:3,18 135:4,7 138:15 141:2 142:9,9,13,24 144:17 145:2,2 147:18 149:9 151:11 153:10,11 154:4,11,15 155:9 156:18 158:16 160:5,23 164:3 166:3,11 167:16 167:17,21 168:20 169:15,24,25 170:8,11 171:3,14 171:16,18,23 172:1,3,18 173:16 174:1 175:11,16 176:13 177:14 178:19,24 180:12 180:12 181:18 182:21 184:8 186:11 187:9,15 187:20 188:5	160:13 161:14 163:8 173:13 174:3 186:24 187:5 known 13:15 14:24,24 56:9,19 57:5,19 58:2,8,23 59:9 61:1,18 64:8 64:13 65:19 71:12 94:16 168:8 183:5 knows 91:5 kruger 5:20 188:15	latest 21:10,14,16 law 9:1,4,6 15:23 23:21,21 50:22 51:4,6 52:18 57:23,25 62:18 64:9,9 67:9 79:23 79:24 laws 15:24 24:5 35:6 59:15 172:17 177:4 178:9 179:7 180:1 181:4,5 183:7 lawsuit 64:7 lawyer 62:16 66:18 lawyers 148:4 leadership 11:25 63:6 leaps 70:4 learn 21:13 learned 21:13 22:20 185:23 learning 103:20 154:5 leaving 19:22 176:11 led 63:24 left 15:15 20:3 81:23 180:7,8 181:15 186:13 legal 11:9,12 24:4 52:13 61:15 62:10 64:11 67:12 68:9 90:16,22,23 115:19 188:17 legislative 178:14 legislators 12:12 legitimate 112:15 legitimately 113:15
k	k 1:13 3:3,10,12 3:16 7:1 189:2,21 190:7 keep 20:18 42:1 kind 10:25 14:8 22:18 23:24 32:24 48:25 50:25 56:24 70:6 110:21 117:24 152:10 160:20 176:8,16 177:20 178:21 182:8 kinds 130:4 133:13 185:12 knew 56:9,18,25 56:25 58:8,23 59:8 60:25 63:5,6 64:8,13 65:18 66:6 71:12 100:13 103:12,15 108:16 108:17 113:10 144:9 167:22 173:8 183:5,9,23 know 17:18 21:8 21:10 27:14,17,20 32:4,7,14,17 35:17 37:7 39:7,8,14 44:13,15 48:15 49:22 54:8 56:23 58:5 64:8,9 66:6 70:21 71:3 74:23 75:4 77:3,15 80:18 82:16 83:13 83:25 85:9 86:18 90:20 96:8 97:3,7	160:13 161:14 163:8 173:13 174:3 186:24 187:5 known 13:15 14:24,24 56:9,19 57:5,19 58:2,8,23 59:9 61:1,18 64:8 64:13 65:19 71:12 94:16 168:8 183:5 knows 91:5 kruger 5:20 188:15	latest 21:10,14,16 law 9:1,4,6 15:23 23:21,21 50:22 51:4,6 52:18 57:23,25 62:18 64:9,9 67:9 79:23 79:24 laws 15:24 24:5 35:6 59:15 172:17 177:4 178:9 179:7 180:1 181:4,5 183:7 lawsuit 64:7 lawyer 62:16 66:18 lawyers 148:4 leadership 11:25 63:6 leaps 70:4 learn 21:13 learned 21:13 22:20 185:23 learning 103:20 154:5 leaving 19:22 176:11 led 63:24 left 15:15 20:3 81:23 180:7,8 181:15 186:13 legal 11:9,12 24:4 52:13 61:15 62:10 64:11 67:12 68:9 90:16,22,23 115:19 188:17 legislative 178:14 legislators 12:12 legitimate 112:15 legitimately 113:15
	l	l 5:1 l.i.p. 2:3 lack 43:13 71:13 73:8 92:25 laden 188:7 lake 13:3 land 139:22 landed 116:1 landfill 187:21,22 landfills 188:7 landscape 58:14 lane 160:2 langrock 2:3 6:16 langrock.com 2:4 language 43:3 53:6 60:1 78:24 83:5 84:12 86:4 87:24 88:5 93:23 97:21 98:4 110:13 120:7 141:23 178:15,16 large 13:17 108:24 172:14 lash 4:7 late 16:7 54:11,20 55:13 75:10 98:20 144:14 155:2	

[letter - massé]

Page 23

letter 75:8 89:8,9 89:20 90:1,3 level 11:13 21:25 30:18 46:9 49:9 58:17 63:6,17 115:15,18,25 147:18,18 161:10 177:15 182:9 184:12 187:10 levels 10:22 63:6 131:15 140:16 143:23 144:6,22 145:3 148:15,16 liability 180:2,7 183:18,20 life 139:5 light 102:5 106:1 112:18 limit 122:3 133:9 143:2 186:11 limitation 59:6 150:9 limitations 147:24 limited 42:18,22 72:7 101:17 103:19 115:13 122:13 125:15 126:13 138:6,9,24 139:19,21 146:16 limiting 138:14 143:22 144:9 148:22 149:3,16 limits 149:13 line 35:3 61:10 89:21 123:22 124:22 175:7 189:8 linear 127:19 lines 10:3 69:12 98:25 115:5 117:20 146:12	list 8:17 38:10,12 38:17,21,25 39:2,6 39:12 40:18 41:7 41:14,16,19 59:12 60:14 152:21 153:6,7 154:2 158:21 161:19 169:15 170:6,8 185:17 listed 9:8 20:18 60:4,18 155:18 189:7 listing 154:14 156:17 lists 8:13 60:12 literature 27:21 28:2 150:6 litigation 15:21 21:17 54:22 little 24:11 42:4 68:7 121:7 172:4 178:10 184:6 lives 160:2 living 23:25 24:2 24:23 llp 1:17 2:8 6:14 located 18:11 31:23 32:1 logical 66:16 long 15:13 41:16 54:1,1 62:5 106:23 125:16 160:8 175:11 181:13 longer 8:25 62:4 121:18 152:1 179:2 look 45:3 54:14 61:13 63:2 66:11 70:17 76:3 90:2 98:21 116:21	117:15 120:25 136:8 141:9 162:6 164:6 165:24 179:19 180:23 looked 45:16,17 69:2 looking 22:23 44:24 61:19 66:14 69:11 94:12 98:17 110:7 119:12 121:17 124:25 140:5 149:10,24 150:5 158:25 looks 41:13 lori 158:18 loss 128:19 lost 89:1,1 104:21 168:5 170:22 lot 25:25 107:9 lots 184:22 lunch 116:9,14,20 m magazine 10:1 magically 138:25 mail 4:13,14 19:13 143:18 148:7 158:7,20 159:16 159:17,23 mailed 30:11 mails 161:14 main 85:22 86:1 173:11 maintain 39:2 72:11 127:6 maintained 129:5 maintenance 31:3 49:4 major 32:9,12 102:5 142:22 143:24 154:21 177:4,17 180:12	making 25:24 51:1 62:8,25 73:5 95:19 150:7 176:20 management 39:19 99:5 manner 175:5 manufacturing 71:2 112:19 186:22 maps 187:19 march 159:17 165:1,16,16,17 167:7 mark 7:25 26:8 28:5 40:22 81:13 82:19 87:13 89:12 109:23 118:5,13 123:7 126:5 141:4 143:4 157:25 163:18 166:12 marked 8:3,5 16:22 26:11,14 28:8,10 40:24 55:21 81:16 82:22 87:16 88:8 89:14 99:18 109:25 118:7 123:9 126:7 136:11 141:6 143:7 158:2 159:10 163:20 166:14 markowitz 13:25 14:2,11 martin 20:4 mary 1:20 6:2 massachusetts 7:23 massé 1:21 6:4 190:3,24
---	--	---	---

material 9:18 128:4,15,23 132:13 135:17 164:14 materials 17:5,9 17:14,15,16,25 83:2 matt 20:5 21:16 22:4,6 40:6,7,11 40:14 matter 5:21 34:21 56:21 58:1 63:15 66:10 101:10,19 102:12 109:14 133:25 135:13 171:20,22,22 180:4 190:9 mauricette 159:24 160:1 mean 11:20 15:7 17:17,18 21:4 39:8 51:23 52:3,6 54:5 56:16,21 57:23 59:10 64:2 75:16 95:15 97:6 115:19 116:3 120:1,23 122:10 125:20 138:1,11 139:8,17 151:23 153:5 156:24 165:24 167:18 168:25 169:9 170:5,8 182:7 184:7 187:8 meaning 33:18 90:16,23 means 130:5 136:21 137:13 138:11 142:16 meant 56:23 127:23 178:10	mears 1:13 3:3,11 5:20 7:1,5 41:2 42:14 71:21 78:10 116:18 174:24 175:3 188:15 189:2,21 190:7 mears's 3:13 measure 139:7 measured 139:6 meat 68:7 media 5:19 139:15 142:4 145:25 146:5 148:18 184:2 188:16 medias 147:6 meet 119:13 136:5 137:7 169:5 170:17 meeting 99:4,11 99:12 158:22 meetings 23:23,24 24:13,24 25:3,4 members 13:12 memo 3:22 4:5,7 4:11,17 27:1,3,4 46:12,20 109:20 110:2,7 111:16 113:25 114:12 164:25 165:14,17 165:19,22 166:2 166:18 167:7,13 170:22 181:14,19 memory 118:15 mentioned 11:18 22:4 93:25 167:7 mere 113:18 merely 47:1 merits 3:12 65:17 162:6 met 19:10 76:11 85:11 183:11,25	method 129:10 130:10 methodology 44:18 45:14 50:12 52:10,21,25 53:18 70:15 michael 164:1,3 microphones 5:16 middle 110:8 122:23 middlebury 2:4 midway 164:9 mind 62:12,23 63:10 64:21 65:11 85:4 87:6 124:24 124:25 134:15 minimum 34:4 132:17,19 155:14 minor 32:9,12 108:3 minority 71:7 minute 116:9 161:24 174:15 minutes 42:7 missing 99:8 misstates 88:14 mistake 110:7 144:8,25 145:1 146:3 mistakenly 112:16 misunderstanding 111:24 112:14,15 113:12 misunderstood 27:2 mitigate 74:14 126:2 mitigating 111:2,2 mitigation 33:10 mobile 35:18,21 35:22 36:1,25	modification 91:20 modified 94:7,8 modify 125:13 mold 14:8 molecule 133:22 moment 34:14 41:25 80:12 81:18 86:4 87:18 93:18 110:3 159:1 183:2 184:5 188:13 monday 1:16 5:11 190:8 monitoring 21:13 61:20 monolithic 75:6 montpelier 1:17 6:1 moot 186:4,8 morning 5:14 6:13 7:5,6 mortality 137:2 152:3 154:17 move 57:15 69:19 77:25 111:18 113:1 176:16 179:17 moved 62:5 98:14 170:25 175:13 176:18 186:4 moving 175:18 176:12 180:23 multiple 48:13 76:16 133:23 municipal 160:4 186:18,20
n			
n 3:1 5:1 naaqs 31:6,8,13 32:3,8,13,20 33:7 35:12 37:16			

[name - object]

Page 25

name 6:2 15:16 143:12 names 15:9 23:13 158:7 nata 4:10 141:10 141:11,17,19 142:17 national 8:21 31:3 36:4 37:23 140:24 141:11,25 142:11 155:20 nationally 155:7 natural 13:20 23:20 74:24 155:14 169:10 nature 24:3 51:1 57:4,5 61:23 62:20,21 63:5,13 70:8,12 71:10 74:3,4 85:10 88:3 101:8 105:25 106:1,18 110:18 112:21,24 115:3 126:17 128:22 134:3 137:24 147:25 149:25 155:21,24 176:7 177:9 179:7 181:24 183:7,23 near 106:3 necessarily 74:9 77:7 116:2 177:7 necessary 74:6 111:18 113:14 132:19 153:15 need 41:16 55:19 70:13 72:9 85:11 111:21 119:14 120:10,20 121:5,8 121:8,16 124:23	needed 84:1 107:13 139:18 149:13 needing 144:16 needs 60:11 138:1 152:18 negative 58:15 negotiation 21:17 neighbors 179:23 neither 190:15 nelson 164:1,3 neutral 52:7 68:23 never 18:10 47:15 62:15 72:11 78:24 79:14 84:15 86:8 nevertheless 91:4 139:13 new 2:10,10 7:22 9:25 10:1 30:7,24 32:18 33:3 38:16 69:20 70:10 92:19 93:21,22 94:22 95:1 96:11 97:18 98:1,9 105:9 107:19 108:5 111:5,22 112:22 115:4,5 125:13 164:19 165:4,10 165:20,22 166:8 167:8,22 168:12 175:24 176:13 news 9:21,23 nods 113:7 168:14 non 90:21 nonarbitrarily 52:6 nonattainment 31:10,18,23 32:2 33:11 noncompliance 45:21,24 46:2,15	46:22 47:2 109:9 nonemployees 161:17 nonresponsive 57:16 nonscientific 57:2 north 4:14 9:13 17:22 18:6,9,13,19 20:11 22:14 23:8 23:24 32:5,15 40:10 54:15 65:19 72:4,25 92:15 98:2 99:25 106:23 134:8,21 143:20 150:25 153:21 157:21 160:2 178:6 187:7,17 notary 189:25 190:4 note 5:15 31:15 56:7,22,25 59:15 110:17 128:8,25 131:17 146:8 148:17 159:11 175:9 noted 46:7 49:10 76:14 77:19 124:1 131:7 143:16 183:14 notes 124:13 174:16 190:6 notice 5:7 55:13 59:18 105:3 108:14 noticing 6:11 notified 155:23 182:20 notify 156:18 170:1 179:21 notifying 92:7	noting 34:21 96:23 november 41:5,18 82:2,8 nox 173:25 nuisance 48:15 49:21,23 50:3,7 51:14 70:7 73:25 74:14 75:12,16,17 75:20 76:2,10 77:13 101:18,22 102:6 129:16 156:22,25 number 3:10 4:3 5:19 13:18 15:1 30:12 35:19 42:17 45:3 56:4 65:18 69:12 81:23 107:25 115:11 117:2,13 121:1,12 123:20 125:3 135:12 158:24 159:1 166:24 188:16 numbered 190:5 numeric 150:8
o			
o 2:3 5:1 o'clock 162:4 o'grady 13:16 object 11:15 22:15 32:22 36:21 40:19 44:11 47:9 51:8 56:20 57:22 63:11 65:13 66:7 68:11 72:22 73:11 74:22 76:13 77:10 85:21 87:8 90:11 91:7 96:21 102:3 104:16 107:5,15 113:16 114:10 121:25 125:9			

[object - operating]

Page 26

142:20 144:7 145:16 146:7 148:10 151:9 152:24 155:5 156:6 157:10,11 157:22 160:17 166:10 168:4 182:6,14 186:19 186:25 objection 64:14 77:18 86:13 87:1 95:23 96:6 126:25 131:11 132:15 133:5 134:10,11 134:24 135:11 138:22 140:19 147:7 153:4 167:15 169:8,23 170:19 175:9 176:1 177:2 178:11 179:14,24 186:5 objectionable 49:9 49:14,24 50:4 102:19 116:21 119:15,23 120:16 120:21 122:16 123:21,25 124:22 objections 5:5,7 6:10 134:18 objective 68:5 obligated 170:8 obligation 21:9 72:12 106:14 115:7 125:11 153:6,8 155:15 170:1,4 177:3 180:2,6,10 181:1 obligations 85:11 86:19 95:16 113:2 169:1,3 179:16	180:23 181:3 183:12,21,25 observations 52:2 observe 63:1 observed 77:21 156:9 obtain 92:10 103:7 108:5 111:22 obtained 109:1 obtaining 104:1 obvious 46:1 obviously 145:1 165:22 occasion 108:9 occasions 12:11 20:15 157:8,18 occur 21:20 138:1 138:9 140:21,22 180:4 occurred 47:6,8 49:24 52:21 59:7 75:17,21 76:23 77:6,15 80:16 96:20 105:23 117:14,16 120:22 144:13 150:12 177:18 179:8 185:17 occurring 130:5 148:9 155:3 occurs 110:21 111:1 127:17 138:7 october 4:3 83:17 83:20 odor 46:10,18 47:15 48:6,7,19 49:8,9,13,14,24 51:14 71:10 72:3 72:19 73:1,21,24 73:24 74:3,14	75:12,15,16,20 76:2,10 77:13 100:25 101:15,23 102:5,22 119:14 119:23 120:16,21 121:6,16,19,23 122:14,17,25 123:25 124:4,9,11 125:8,18,23 126:2 126:14 129:16 156:21 odors 45:18 50:4 73:13 77:22 102:19,23 116:21 118:19,22 121:13 123:21 124:13,16 124:22 125:12 143:25 185:13 offended 174:16 offensive 102:23 118:22 143:25 offer 16:25 57:2 74:9 80:6 180:25 181:4,7 offered 56:7 95:7 offering 19:8 73:18 office 8:22 11:8 75:4 176:10 officer 44:3 officers 44:16 offices 1:16 official 68:18 officials 64:21 70:9,17 74:20 105:20 106:5 107:12 160:24 175:20 182:9,10 182:22 offsets 33:10	oh 89:8 99:23 103:11 143:4 162:15 174:6 okay 6:4,22 7:9,12 7:25 8:11 12:22 18:17,21 19:10 37:14 40:14 41:15 41:21,22 45:4 53:13 55:18 63:22 77:23 78:10 81:19 91:13 92:9 93:13 99:3,7,15 101:12 106:25 110:5 116:18,20 117:6 118:15 119:7 124:16 135:19,19 152:17 157:5 161:13,23 163:8 187:2 188:13 old 187:24 once 20:7 110:22 179:16 ones 60:20 117:17 ongoing 46:15 47:15,24 70:7 72:18 141:12 open 60:1 122:8 operate 78:17 79:22 84:25 89:23 90:4,9,19,21 100:7 100:11 111:5 173:9 179:20 operated 31:25 74:17 92:4 95:9 96:14 111:3 127:23 174:9 operates 132:24 operating 22:13 53:10 78:16,22,23 79:2,6,10,13,15,17 79:21,24 80:2,8,14
---	---	---	--

80:20 81:1,6 82:9 82:17 83:14,21 84:2,6,15,24 85:4 85:5,8,19,24 86:6 86:11,17,18,25 87:4,23 88:10,20 90:15,25 91:6 104:20 111:10 115:4 127:13 131:21,25 132:12 135:8 155:16 157:21 159:3,3 160:16 166:4 185:3,22 187:23 operation 110:11 128:16 132:20 133:13 179:3 operations 69:19 85:10 92:11 103:6 125:12 175:18 178:7 179:21 180:5 187:11 operative 124:19 operator 58:8 opine 84:5 85:8 95:21,21 135:6 182:2 opined 44:20 94:3 94:5 173:2 opining 77:7 93:14 opinion 16:13 17:21,24 53:3,19 56:18 57:2 62:22 62:25 65:2 66:12 66:19 68:13 69:5 71:20,21,22 72:1 73:18 74:9,15,21 77:14,16,19 79:1 80:1,15 91:12 95:6 117:10 130:22,25 131:2	132:3,10,11,16,22 133:2,8 134:7,20 146:22 160:21 171:5 172:8,22 opinions 16:24 17:6 19:7 25:11 25:18,18 26:19 30:15 43:7 45:15 52:12 53:2,14 56:5,8,15 62:20 63:9 65:10,22 67:6 68:16 80:11 80:13 180:14 181:1,4,7 opportunities 9:7 24:7,20 opportunity 62:24 114:18,21 opposed 25:18,22 132:12 opt 36:7 option 36:6 oral 67:15 order 111:19 187:12 ordered 190:14 orders 50:10 74:12 94:13 ordinary 115:21 organic 101:10 102:21 134:1,2 organizations 62:4 oriented 61:17 origin 27:3 original 4:18,19 originated 178:7 outcome 6:6 68:22 outcomes 74:2 outdoor 137:13,23 138:5,7,10 139:12 139:20,22 140:6	140:10,15 152:19 outreach 21:15 outset 96:2 178:13 179:10 outside 18:1 160:18 overbroad 173:7 overcome 113:19 overstatement 117:12 173:11 179:5 overview 4:10 owner 58:8	paid 54:18 55:9 paper 81:21 paperless 81:20 paragraph 43:22 56:4,6 69:11 78:11,15,20,23 81:24 84:13 87:20 88:9,10,18 89:6 90:2 91:18 93:19 93:20 97:22 99:4 100:6 103:3,4,5 108:2 110:9 111:16 116:23,24 126:12 128:8 135:21,24 141:18 141:19 150:23 151:17 153:19 159:21 160:4 162:9,17 164:6,10 164:14,18 166:21 parallel 176:8 182:8 paraphrase 120:3 pardon 89:8 parentheses 164:21 parenthetical 88:22 89:6 163:2 park 2:9 part 9:13 31:2 37:1,9 57:20 59:8 70:4 112:16 119:19 151:6 152:6 160:19 partially 72:10,11 partic 10:23 participant 163:25 participants 163:25 participated 155:20 173:8	
		p		
		p 2:3 5:1 p.e. 3:20 56:5 page 3:3,10 4:3 25:8,8,10 42:15 43:22 45:3,9 53:14 56:4 65:17 69:7,8 78:10 81:22,23,24 82:24 84:12 85:17 86:23 87:19,20 88:1,1,8 89:19 91:15,18 93:18,19 97:22 99:3 100:3,5 101:13 103:2 107:18 108:1 110:7,8 111:15 116:22,22 122:22 122:23 123:14,16 126:11 128:7 135:21 136:14 141:16 150:19,20 150:22 153:17 159:20,23 162:14 162:15 164:17 166:22 189:8 pages 44:19,24 45:11 87:19 190:5		

[particular - pfoa]

Page 28

particular 9:23 12:20,23 15:7,23 24:9 30:14 31:18 35:25 46:12 48:7 52:19 58:9 59:4 59:20 60:23 68:21 70:5 85:15 90:3 90:19 121:20 122:2 134:4 147:23 161:16 172:19 177:18 185:6 particularly 11:8 71:1 75:10 particulate 101:10 101:19 133:25 164:10 171:19,21 171:22 173:24 parties 5:3 110:10 190:17 parts 54:6 partway 110:9 party 6:5 passage 35:5 pathway 161:9 pathways 150:2 pause 41:24 pay 114:1 155:16 paying 17:21 penalized 73:20 penalties 11:7 73:23 103:9 104:11,12 105:5 108:4 penalty 58:18 74:10 108:3,8,20 108:23 109:11 113:6,22 114:1,9 114:16 115:1,10 115:12,13,15,18 115:25	pendency 85:12 pending 84:25 86:12 people 48:14 51:1 53:7 58:12 61:24 62:2,4,8 116:10 119:16,21,22 120:10,11 121:1,8 121:13,21 141:22 160:23,24 161:5 people's 18:15 23:25 161:22 183:19 percent 119:22 120:15 125:7 percentage 119:15 119:18 perfectly 14:18 perfluoroisobuty... 166:24 perfluorooctano... 166:25 167:3 perform 151:2 153:22 performance 1:7 5:22 190:12 performed 117:19 117:23,24 118:1,2 125:24 performing 61:10 period 10:6 18:17 20:21 22:13 51:20 53:9 72:17 73:6 73:10,20 91:15,23 95:2 97:15,17,19 98:3 102:2,11,25 104:21 105:21 106:13 107:17 111:10 121:4,17 122:4 125:16 129:7 157:20	174:9 175:22 176:23 181:11 permission 90:9 permit 3:21 51:13 59:3,7 78:22,23 79:2,6,10,13,17,21 80:3,14,17,21 81:1 82:1,3,9,17 83:14 83:21 84:2,6,15,24 85:4,5,8,12,13,19 85:25 86:6,8,18,18 86:25 87:22,23 88:3,10,19,25,25 89:10,17,21,22,22 90:15,18,21,25 91:6,6 92:3,6,10 92:14 93:1 95:15 97:17,24 98:1 99:17,24 100:3,5 100:16,18,24 101:13 102:13 103:6,16 104:1,10 104:20 105:1,9 107:1,13,20 108:5 108:15,16 110:13 110:25 111:6,22 111:25 112:17 113:9,10,14 124:19,20,25 128:10 130:2,10 132:1 149:13 183:16 184:24 185:18 permits 45:6 74:6 78:12,16 79:15,24 81:6 87:22 88:15 88:20 91:14,20,24 95:18 103:8 106:21 107:8 108:13 114:8 129:24 177:12	183:14 permitted 173:9 177:23 permitting 71:14 96:1 103:25 114:2 130:2 142:23 persistence 144:18 persistent 74:4 156:21 person 27:6 40:6 62:7,25,25 93:21 personal 10:25 12:9 36:13 43:10 71:20 77:14 128:21 146:8 149:14 183:19 personally 10:16 11:14 18:12 25:21 48:21 50:6,8 60:24 61:6 145:12 150:17 personnel 39:11 159:18 persons 1:4 183:20 190:11 perspective 59:11 65:5,5 persuade 70:13 peruse 41:15 petition 38:15 petitioned 38:20 38:23 petitions 169:11 169:12 pfas 30:8 pfoa 9:10,16,19,22 10:13 20:12,19 23:1,7 24:25 37:16,20 38:12,20 38:24 39:5,11 40:16 41:18 53:23
---	--	--	---

[pfoa - potential]

Page 29

53:25 54:3,7,11,20 55:9,13 56:9,12 63:24 65:19 66:23 130:14,18,21,23 131:3,9 132:4,8,13 133:1,4 134:9,23 135:2,10 144:11 144:14,15,18,20 145:3 148:22,24 149:3,7,17,19 150:12 151:7 153:2 154:2,12,21 154:24 155:2,12 157:3 162:11,12 162:21,23 163:14 164:21 165:11 166:9 167:14 168:12,16,18 169:5 170:16,17 171:7,17,21 172:2 172:14,21 173:3 173:10 174:5,10 175:6,25 177:23 178:4 179:12 182:5,24 185:15 185:17 186:3,13 186:14,17,23 187:6,16 188:3,7 ph.d. 3:12,17 143:12 phil 170:22 176:5 philip 3:12,16 4:5 4:17 123:4 166:19 phone 19:12 27:3 27:4 phrase 58:2 69:23 88:2 133:7 152:11 physical 136:24 152:11 171:21 pick 5:16	piece 132:23 147:19 pieces 52:11 place 70:22 90:10 92:18 96:24 110:25 119:5 120:25 139:5 placed 136:4 155:15 places 18:11 plaintiffs 1:5 2:2 6:17 16:4,20 18:2 19:20 23:4 30:2 30:11 plan 33:13,16 34:14 37:6 81:10 planning 24:15 plans 33:20 plant 47:17 48:10 54:16 58:8 106:1 124:15 132:14 133:4 150:25 153:21 159:2,3 160:7,25 161:6 165:10 167:23 168:13 171:7 172:14 175:13 185:10 187:10 plant's 132:4 184:3 plants 22:13 168:9 plastics 1:8 5:22 190:12 play 95:12 played 68:18 155:6 players 114:19 playing 118:16 pleasant 2:3 please 5:15 6:10 6:19 8:11 28:6	35:15 40:22 42:2 81:13,18 82:19 plus 117:7 pm 188:19 point 35:2 37:19 41:25 75:18 77:24 85:22 86:1,15,15 87:9 90:13,22 95:19 97:6 116:8 121:19 146:25 147:11 157:16 158:14 168:20,23 168:24 173:12 184:10 187:24 pointed 108:4 points 129:14 policies 178:13 policy 11:8,12 15:23,24 52:13,18 69:14,17,23 70:19 109:14 110:18 political 12:2,7 181:23 pollutant 31:19 37:17,21 38:17,21 38:24 60:21 140:21,23 186:11 pollutants 31:16 32:3 35:11 37:15 38:4,7,10,13 52:14 52:18 60:15,18,18 70:8 101:10 102:18 129:6 134:5 173:24 174:1 177:5 178:17 polluter 183:18 polluting 69:18 pollution 3:15 4:4 4:8 15:24,24 17:19 24:5 25:12	30:25 37:25 39:18 41:3,8 42:19,23 43:11,11,24 44:21 45:6 51:16 52:13 52:19 58:3 59:15 69:20 70:11,14 71:19,23 75:2 79:25 95:16 98:7 102:16 106:19,22 110:12 112:1 114:3 118:10 124:17 125:14 127:16 129:22 130:17 131:16 133:24 135:16 137:1,9,12,13,21 140:1,5,16 142:12 142:19 172:17 173:22 176:25 177:4 179:6 181:9 polygraphic 160:2 poor 104:24 poorly 151:12 portion 9:17 131:17 132:8 135:3 137:17 pose 60:4 position 8:20,23 18:10 19:1,22 126:13 186:6 positions 8:18 9:8 possible 69:16 76:5 125:5 168:2 170:12,15,20,20 187:1 possibly 115:12 post 113:18 potential 46:22 47:2 59:4 122:8 145:8,24 147:5 149:11,25 150:1
---	---	--	---

155:25 156:12 168:18 169:25 182:20 183:9 practical 75:25 practice 122:6 practiced 67:9 practices 177:10 pre 93:8 95:1 preapproval 111:14 115:6 precautions 124:21 125:4,5 preceding 88:17 precipitator 171:24 precipitators 171:11 172:6 173:15 174:9 precise 16:6 20:25 preconstruction 32:19 33:4,6 90:18 92:6,19 95:14 110:19,25 111:12 predict 77:5,12 predicted 156:2 predominance 188:1,1 preface 91:17 preferred 126:23 preliminary 4:12 premise 168:5 185:4 premised 177:13 preparation 29:15 30:4 prepare 29:21 prepared 16:15,21 126:22 preparing 27:15 29:19 68:3	presence 137:13 137:22 138:20 139:15,19 140:6,9 140:15 144:9 146:4 148:22 149:17 152:19 165:6 178:18 184:1,14 present 6:7 20:9 35:2 65:4 87:5 138:4 139:21 142:3,3 143:23 146:18 154:22 161:21 presented 66:9 156:11 pressing 71:18 pressure 12:2,7,11 110:21 presumably 100:9 pretty 150:20 173:23 prevailed 77:2,16 prevent 124:21 184:13 prevented 103:19 preventing 125:8 prevention 102:19 102:23 preview 41:16 123:12 previously 99:18 100:13 105:2 primarily 14:16 15:5 45:16 46:24 61:16 80:7 129:15 133:17 146:10 177:25 primary 43:17 147:17 152:13 161:21 177:3	186:13 principle 105:20 principles 53:1 printed 9:18 prior 12:6 14:10 19:5 42:25 43:13 43:23 66:25 91:16 93:1,15 94:16,25 95:15 100:10 104:2 110:12 111:22 113:8 153:3 priorities 10:24 priority 160:5 private 5:17 183:19 proactive 71:5 proactively 72:12 72:13,15 106:17 106:18 probably 11:1 18:14 40:5,7 84:10 135:12 146:16 171:2 problem 12:8 126:18 162:15 problematic 167:8 problems 37:25 47:17 57:13 72:14 76:4 147:25 procedural 21:16 85:16 procedure 5:5 85:13 proceed 6:20 7:15 116:18 118:12 proceeding 6:10 77:1,2,8 proceedings 10:17 11:14 73:9 76:9 97:5 104:15	process 24:6,7,9 54:11 57:8 66:19 68:8,12,13,24 71:2 107:13 127:19 130:2,19 148:4 153:11 163:13 177:10 processes 11:21 164:22 processing 79:22 produced 28:17 190:18 product 112:23 115:5 professional 8:13 8:18 professor 62:18 64:10 proffered 67:25 program 10:24 11:22,25 13:7,11 13:12 24:18,19,20 31:8 32:8,13 33:18,19 35:12,17 36:1,14 37:11,16 39:22 40:13,18 44:8 75:3 82:5,9 82:13,14,17 83:1,3 83:10,14,21 84:1 109:8 114:4,7 115:9 140:25 142:1,12 147:12 147:13,17 181:8 183:12,21 184:11 184:17 programmatic 147:23 programs 11:24 12:23,25 13:5 15:4 30:21,23 31:2 34:12,17
--	--	---	--

39:17,21,24 44:10 44:14 82:1,3 142:23,23 148:1,6 148:18 177:13 prohibiting 178:16 prohibition 122:1 150:9 prohibits 185:20 project 13:8 110:23 113:3 promise 182:17 promote 37:10 promoting 37:4 promptly 176:19 prong 110:16 112:5 113:5 116:2 proof 76:11 184:17 proper 62:12 64:16 property 123:22 124:22 183:19 propose 174:14 177:6 proposed 82:3,9 114:1 protect 106:14 184:12 protecting 34:24 105:13 182:18 prove 73:25 75:13 75:19 125:7 proven 172:16 provide 16:12 65:2 66:18 107:13 provided 18:2 27:17 42:24 53:11 102:6 proving 122:11	provision 96:3 101:16 122:17 provisions 44:21 59:23 86:22 ptfe 89:23 100:7 162:23 163:14 public 24:13,13,24 25:4 34:25 52:13 54:10,19 57:9 58:15 59:16 60:4 109:5 110:18 146:11,15 147:20 154:25 156:21 160:24 172:23 178:17,19 182:17 182:18 184:12,16 185:20 189:25 190:4 publicity 54:21 publish 38:10 pull 165:24 pure 155:21 156:3 156:7 purported 117:5 purpose 33:6 110:24 129:15 131:17 184:10,23 purposes 14:22 65:23 142:9 178:22 pursuant 94:17 pursue 9:7 58:17 58:18,18 76:1 156:18 169:2 182:19 pursuing 58:16 pushing 113:1 put 37:19 68:7 173:18 puts 170:6	putting 106:25 144:20 152:20 161:13 169:15 puzzle 66:8 q quality 31:4 37:23 60:19 136:22 143:19 151:24 quantities 137:14 140:11 quantity 136:24 152:1 question 4:15 14:19 17:12,13 32:5,15 35:7 36:23 39:15,20 40:1,8 41:17,17 44:23 46:14,19 56:3,17 62:6 64:18 68:15 80:5 87:2,5,6,11 94:19 97:20 104:24 106:10 108:17 119:8 122:13 123:12 125:14 128:13 133:7 134:15 135:12 139:17 148:14 151:13 156:2 157:11,12,12 158:24 159:1 160:20 161:5 168:5 169:2 172:25 176:15 184:19 questions 11:9,12 27:10 32:24 45:22 45:25 46:22 47:1 47:19 57:9 59:2 64:5 70:7 74:7 104:17 105:22	106:4,9 107:7 153:14 157:24 158:21 175:3,7 181:11 quick 162:7 quickly 111:18 159:6 174:15 quite 13:18 14:25 15:13,17 25:25 106:16 172:12 quote 122:15,19 153:18 quoting 152:1 r r 190:1 rabbit 139:17 races 20:7 rain 38:2 raise 169:1 raised 46:14,19 47:20 74:7 155:12 raises 47:13 172:24 raising 37:13 107:6 ramp 112:18 range 46:16 185:11 rate 28:20,22,25 29:4 reach 143:2 reached 187:13 reaching 45:15 53:2,18 reaction 139:2 read 5:9 25:19,25 26:6 29:23,24 30:13 56:2 66:5 69:1 82:24 123:11 125:21 137:4,17 154:15 163:5
--	---	---	---

[read - regulate]

Page 32

189:3 readily 139:6 reading 29:24 84:14 86:23 reads 69:13 78:21 81:25 83:1 122:24 ready 116:18 159:12 real 111:12 162:7 realized 35:16 realizing 162:13 really 20:23 54:4 54:18 57:12 64:6 71:3 111:13 131:18 132:9,22 161:9 173:6 176:17 187:23 reask 157:12 reason 40:6 83:7 83:16,19,23,24 85:14 105:19 112:14 128:19 129:23 133:10 154:5 160:14 170:12,15 172:11 182:3 reasonable 124:21 125:3,6,10,15,16 173:2 182:2 reasonableness 57:20,24 122:9 reasonably 110:15 137:1 152:2 reasons 65:14 76:1 113:8 122:12 129:20 154:20 170:24 rebuttal 3:10,16 55:23 56:5 recall 7:24 9:23 12:15,17,17,20	14:3,11,15 15:8,9 15:16 18:14 20:24 21:4,23 22:1,6,17 23:13,14,25 25:24 26:25 29:20 39:14 39:25 40:8,21 46:11 54:7 60:21 60:23 61:3 93:6 93:13,16 94:12 98:11,12,24 99:12 99:14 107:6,25 117:24 119:4 126:3,4 147:8 160:21 161:1,4 165:8,11,25 178:3 181:21,24 recalling 13:8 15:6 93:9 receiving 166:7 recess 42:10 78:6 116:14 162:2 174:20 recipients 150:1 recite 34:15 recognize 26:13 28:10,16 89:16 118:9 143:12 recognizing 56:13 71:4 recollection 24:12 24:16 98:17 119:11 144:12 161:12 165:21,24 175:14 recommend 167:5 177:6 recommendation 169:14 170:14 recommendations 126:3	recommended 126:1 recommending 181:14 record 5:15 6:9 42:8,11 43:17,19 45:16,18 47:11 49:12 51:17 52:15 53:20 54:14 55:7 57:3 66:3 70:5 75:1 78:4,7 96:10 107:12,16 109:20 116:11,12,15 120:20 129:1,19 130:9 147:1 161:25 162:3 174:18,21 188:14 188:18 189:5 recorded 1:12 5:20 records 3:13 28:13 61:23 167:18 recovery 44:6 red 155:13 reduced 71:19 reducing 102:20 134:8,23 143:25 refer 69:6 90:15 reference 12:18,18 26:4 39:23 40:17 57:25 79:13 89:4 109:20 116:24 126:4 129:14 143:10 145:24 referenced 17:6 17:10 18:25 27:2 27:5 45:21 48:6 107:18 110:2 117:8 123:14 158:12 165:10 181:3 182:11	references 129:17 164:25 171:10 referencing 39:21 46:12,13 59:21 referrals 11:7 referred 36:3 158:13 referring 12:14 60:6 90:8 99:11 refers 28:19 90:15 99:4 112:13 140:6 140:9 164:5 reflect 114:2 reflected 17:3 19:1 47:17 refuting 131:18 regard 74:10 93:8 104:25 133:1,13 135:15 171:16 175:22 185:14 regarding 23:1 48:19,23,25 49:4 49:12 50:6 58:7 60:25 63:9 65:10 66:6 96:18 105:3 105:6 107:14 166:7 175:24 178:4 180:22 181:5,20 regardless 113:21 140:17 176:22 regards 114:3 region 31:12 regional 37:9 register 3:18,19 84:9 86:21 87:10 regrettable 106:24 regs 136:8 151:14 regularly 18:18 regulate 33:14 38:6 143:3 147:15
--	--	---	--

148:18 183:15 regulated 58:13 59:11,13 60:3,11 61:19 66:21 70:25 71:23 156:14 185:17 regulating 36:11 40:16 regulation 30:24 43:14 52:14 59:18 59:20 93:2,15 95:5 119:5 120:1 120:4 147:12 185:6 186:3 regulations 3:15 4:3,9 25:12 31:19 31:22 42:19,23 45:6 50:22 51:4 58:4 59:22 81:11 106:21 119:12 120:24 140:2 172:9 regulator 64:23 regulators 37:21 51:19 60:2 61:21 70:3 73:4 116:3 128:17 176:21,22 180:25 regulatory 12:23 12:25 15:3 22:12 24:4,6,9 25:17,22 30:21 40:18 42:25 43:7,19,25 44:9 45:12 48:19,23 49:7,12,22 50:6 51:17 53:8,15,23 53:24 54:11,20 55:3 58:7 60:7,24 63:14,14 64:20 66:5,25 69:24 74:6 76:1 87:3	103:19 106:7,11 107:11 109:8 110:21 113:2 115:9 118:21 119:9,14,24 120:6 122:17 137:21 142:6 147:1,13 148:6,17 156:1,10 156:16 169:6 170:18 177:1,19 178:9 179:11 181:8 182:25 183:12,21 184:4,9 184:17,20 185:4 relate 100:25 101:14 106:4 138:3,19 152:19 related 6:4 9:9,22 13:9 14:17 25:22 35:7 94:10 101:25 130:18 132:9 146:4 161:5,16 190:16 relates 36:24 59:1 96:13 101:16 108:25 122:1 133:17 relating 102:15 relation 127:20 relationship 65:3 128:23 relative 190:18 relatively 23:16 75:23 121:11 130:16 release 173:3 released 184:15 relevant 50:17,22 51:4,20 66:12 73:6 103:20 120:25 121:14	142:14,24 176:3 relied 14:15 17:5 17:15 25:13,17 27:12 53:6 69:2 115:24 130:6 relief 74:12 relies 63:16 75:21 153:9 177:15 relieve 183:17 relocated 92:15 rely 17:10 25:12 27:11,15 49:17 130:3 142:23 177:7 relying 161:11 remains 185:5 remember 16:6 24:22 40:5 165:8 175:7 181:16 remembering 14:3 remotely 6:8 removal 131:15 178:2 removals 132:19 remove 129:4,4,12 129:18 130:14 133:18,20,25 134:5 135:1 152:22 171:7 173:21,23 174:5 174:10 180:6 removed 129:7 132:8 135:3 179:1 removes 133:24 removing 130:23 131:3 132:4 171:17 172:2 repeat 44:23 94:19 97:20 157:16 repeated 119:25	repeating 134:16 replaced 129:5 158:12 replicate 34:5 report 3:10,12,16 3:20 4:12,16 8:1,6 16:11,15,15,16,18 16:25 17:3,7,11,15 18:3,3,22 19:16 25:7,19 26:3,16,17 26:20,22 27:5,11 27:12,15 28:3 30:7,10,14 41:22 42:14 43:4,18,20 43:22 44:19,25 46:13,20,21 47:7 55:23 56:14 65:17 68:3 69:1,6 78:11 79:9 84:12 85:17 86:4 87:14,19,20 88:7 90:13 91:5 91:14,18 93:5,10 93:19,25 94:15,24 95:25 97:22 99:3 103:2 107:18 108:1 116:22 117:8,12 122:15 122:19,22 123:14 123:14 124:3,10 127:5 128:7 131:17 135:21 143:18 144:4 146:22 150:19,22 153:17 162:6,15 163:3,9,24 164:17 164:25 165:12,13 166:22 172:5 173:2,6,12 177:21 181:1,5,7 reporter 1:21 6:3 6:18,22,25 190:3
--	---	---	--

reports 16:21 26:4 26:6 29:25 45:19 46:8,18 52:12 77:20 123:3 129:14 131:8 represent 41:2 141:8 representatives 99:5 request 38:16 175:5 requested 190:14 require 33:10 38:6 91:24 124:20 150:9 151:1 153:22 156:13 173:14 174:4 176:23 182:4 185:24 required 33:16 60:17 69:21 78:13 78:16 79:16,24 80:20,21,25 81:6 86:19 93:21 94:17 94:25 107:8 119:18 128:10 129:24 149:7 151:2 153:23 155:19 167:25 requirement 38:9 79:2,10,23 80:2,25 81:3 84:24 85:4 85:16 86:5 92:3,6 92:9,11,14 93:1 95:15 97:25 103:7 110:19 111:13 114:7 132:18 133:16 173:17 requirements 34:4 35:25 36:18 44:9 51:13 71:15 79:6	80:9 81:10 92:7 92:18,20,25 93:11 95:10 96:2,23 103:25 106:7 108:17 112:1 131:25 179:10 requires 66:4 94:21 95:5 requiring 91:19 175:24 reread 153:18 research 140:3 153:15 reserved 5:6,8 resided 18:4,6 resident 160:2 residents 23:8,11 23:23 157:8,18 160:15 resigned 9:6 resolve 46:5 resolved 47:15 resource 44:5 74:24 resources 13:20 23:21 103:19 105:25 150:4 155:14 169:10 respect 32:2,13 52:20 60:17 73:13 97:18 124:11 145:18 176:5 respected 15:14 143:17 145:17 respectful 157:13 respective 5:3 respectively 128:13 respond 64:24 72:19 86:16 170:7 170:13	responding 65:10 95:24 96:14 173:6 response 16:13,16 22:7 39:25 47:21 54:20 63:14,21 68:14,15 72:7 80:7 81:3 95:6,8 95:13 96:12 97:1 97:2,4 134:14 182:12 183:6 responses 53:23 53:25 responsibilities 182:12 responsibility 57:12 130:11 169:11 responsible 33:13 180:11 responsive 148:14 rest 98:15 restaurants 18:15 restrictions 35:21 51:14 result 113:21 137:2 142:2 152:2 157:20 178:20 180:4 187:11 188:3 resulted 106:22 107:22 154:6 185:13,21 resulting 130:19 173:10 results 58:20 retained 15:18 16:3,5 21:21 22:2 188:16 retains 180:1 retention 16:10	retrospect 70:16 106:16 145:1 170:25 176:18 182:16 reveals 43:23 reversible 137:3 154:18 review 9:21,24 16:11 19:15 25:25 27:21,21 28:2 30:10 32:19 33:4 33:6,21 50:16 53:20 63:9 66:2 70:4 84:9 92:6,19 92:19 129:19 141:12 142:10 144:9 146:18 190:14 reviewed 26:5,17 50:13 53:22 143:18 160:19 167:19,21 reviewing 30:7 42:24 49:12 51:17 120:20 reviews 150:6 richard 158:16 right 5:9 23:18,18 33:24 41:14 65:24 68:1 75:13 76:21 76:23 77:9 82:25 93:17 98:13 100:14 104:2,7,15 121:9 159:1 162:18 168:10,13 169:22 ripley 176:9 rise 48:2 54:16 55:8 rises 49:8
---	--	---	--

risk 72:12 109:5 150:9 157:9,19 170:2,5 177:25 182:20 risks 54:14 55:1 59:17 70:12 71:13 72:13 152:18 155:21,25 156:12 156:15,19 170:1,9 170:11 182:19,23 183:9,9,22 rmr 1:21 190:3,24 rob 10:1 54:23 role 12:7 64:7 68:16,17 roles 12:2 room 6:7 24:2,23 rooms 23:25 round 157:23 175:3 rounds 157:24 rudeness 157:11 rule 77:13 135:25 136:3 147:5 151:3 153:24 169:4 rules 5:5 7:14 41:4 41:9 43:11 44:22 79:11,12 85:8,10 85:20 86:25 91:19 92:22 93:21 94:1 94:2,4 98:7 118:10 119:13 121:5 124:17 138:3 142:19 154:16 169:21 178:9 181:9 run 71:17 112:19 121:20,21 running 176:8 runs 95:25	résumé 43:21,23 s s 3:8 4:1 5:1,1 safety 156:10 saint 1:7 5:22 6:15 21:18 22:12 42:24 44:20 45:5 53:9 56:8 65:12,18 69:16 70:17 73:9 73:19 74:17 76:10 76:21 150:24 153:1,20 155:1 171:6 172:9 175:6 178:21 179:18 180:9 190:11 salt 164:21 sample 119:19,21 120:10,14,15 sampling 30:8 sarah 158:10,18 satisfies 125:11 satisfy 119:23 saudi 111:19 saw 12:2 96:9 107:16 143:10 171:9 saying 138:8,18 139:20 168:19 179:9 184:10 says 45:5 140:13 141:17 148:15 160:4 scene 51:20 54:24 77:21 scheme 43:1,25 177:1 179:11 schmeltzer 20:7 21:12 school 9:1,5,6 23:21 62:18 64:9 64:9	schuren 4:13 20:4 158:14 schwer 4:13 40:13 158:8 159:24 science 22:21 scientific 56:8,15 56:17 142:10 147:19 148:3 150:4 151:11 scientists 128:18 scope 15:21 16:10 18:1 160:18 scrubber 171:14 scrubbers 171:11 171:16 172:5 173:15 174:8 seats 116:6 sec 99:7 second 29:24 73:22 78:11 88:9 90:2 93:18 103:3 106:4 109:2 141:16,18 159:6 164:6,18 168:24 secondly 145:6 154:23 secretaries 12:12 secretary 13:19,23 14:10 75:3 136:23 151:7,10,25 152:8 153:15 169:5,9,16 169:19 170:1,2,5,6 170:10 176:9 section 45:8 93:20 94:1,4,11,17,20,21 95:5,12 96:18 97:13 118:18,18 123:19 124:6 136:5 secure 69:15	see 25:14 27:9 28:20 30:8 43:1 43:25 44:4 53:16 65:20 69:10,21 70:21 78:13,18,24 82:6 83:5 84:15 87:24 88:5,11 89:8,10,23 90:2,3 91:21 93:23 98:3 99:6,9 100:7 103:10,11 108:6 110:13 112:2 114:4 116:25 117:16 118:19 123:1 125:2 126:19 130:9 136:1 141:14,23 144:1,11 145:22 145:24 146:16 148:8,11,16 151:3 152:4 159:4,18 160:11 162:24 163:3 164:1,12,15 164:23 166:25 167:10 168:19 seeing 158:10 seeking 129:21 seen 26:4 55:25 56:13 69:13 109:16 110:5 117:21 126:9 143:9,11 158:4 163:22 166:16 seldom 60:13 selected 67:5 133:9 selecting 27:22 self 47:16 94:6 132:7 177:16 semantics 56:22
---	--	--	--

sense 52:7 65:25 90:22 92:5 96:13 115:21 132:6 135:16 141:1 171:15 sensitive 5:16 sent 165:23 sentence 25:9 69:13 78:15,21 84:14 88:4,9,13 96:17 108:2 110:10 122:24 141:10 164:9,18 sentences 88:17 97:23 111:17 separately 39:2 september 1:16 5:11,15 8:20 166:18 167:12 175:12 190:8 series 10:2 serious 45:22,25 46:14,22 54:10 74:7 80:5 103:8 103:25 104:10 137:3 154:17 155:12 seriousness 109:5 114:2 serving 63:13 set 16:25 17:20 24:13 34:3 36:2,4 36:5,18 47:16 64:19,24 65:7 66:9 73:16 106:3 106:4 115:4,23 142:6 148:21 149:2 172:15 182:8 188:11 setting 114:8 115:15,18	severe 108:6 sgpplvt0402275... 4:4 sgpplvt0402351... 4:9 share 24:15 74:21 95:18 97:8 182:21 shared 87:10 166:2 sharing 97:1,1,3 shocked 173:17 shop 179:17 181:15 short 23:16 33:21 111:10 shorthand 36:3 show 55:19 76:22 90:22 showed 128:9 showing 149:19 shows 42:18 shut 185:25 side 7:12 114:19 sign 5:9 signature 190:24 signed 50:9 significance 30:15 significant 13:2 21:5 48:5,12,16 51:11,22 54:19 106:21 107:4,10 110:23 114:14,15 124:7 126:16 134:8,22 135:1 156:12 177:15 significantly 34:8 34:16,18 35:9 111:4 similar 119:10 120:19 164:21	similarly 1:4 102:19 190:11 simply 24:3 96:7 111:9 112:21 155:19 sincerity 112:9,10 sip 34:7,18 35:8 sips 33:20,23 34:2 35:9 sit 84:4 87:6 114:18 119:8 133:2 site 22:21 51:1 76:4 77:21 143:25 145:2 sitting 18:21 93:8 situated 1:5 190:11 situation 9:13 40:10 60:16 103:18 177:18 183:13 situations 60:11 six 29:14 97:18 98:9,16 104:1 105:9 size 119:19 ski 12:18 skinner 1:17 5:25 slightly 111:2,11 slow 176:11 small 27:8 71:7 smelling 160:9 smoke 77:22 160:7 smoked 161:5 smoking 161:8 social 20:8 society 8:21 soil 138:15,20 139:6,23 140:17 140:23 145:3	146:14 148:19 180:3 solely 61:23 122:13 138:23,24 solutions 22:24 188:17 somebody 27:4 165:23 somewhat 66:8 176:4 179:3 soon 98:19 sooner 81:2 sophisticated 70:25 177:8 sorry 17:12 35:13 44:23 72:23 89:1 94:19 98:23 104:21 119:3 136:16 144:5 162:13 sort 30:18 48:15 127:19 147:13 185:5 sought 74:5 sound 56:16 source 29:25 32:12 35:21 36:25 60:11,16 91:21 92:19 121:16 125:12 130:4 136:4 145:4 154:21 186:13 187:6 sources 30:24 31:19,23 32:9,18 33:3,14 35:18,22 36:1 78:18 79:25 93:2,21,23 94:21 94:22 95:1,16 96:11 108:5 142:22 149:11,12
--	--	---	---

[sources - stay]

Page 37

149:25 187:16 south 2:3 speak 46:21,23 57:17 62:3,7,25 101:7 speaking 48:3 61:24 speaks 46:24 114:11 specific 10:21 13:8 17:25 21:19 34:15 34:20 35:10 37:24 39:21,23 54:20 57:25 60:12 61:3 61:18 90:16 93:7 94:13,15,24 104:17 119:15 127:3 133:21 147:8 161:10,14 167:6 172:18,18 184:6,22 185:1,15 185:16 specifically 10:12 14:11 39:14,22 40:17 42:17 51:13 53:8 54:8 60:21 73:16 74:10 88:8 94:10 95:24 101:22 140:6 141:1 148:8 166:23 171:10 172:3 173:16 174:5 specifics 12:17,20 21:4 120:24 165:11 174:1 specify 186:18 spectrum 145:7 speculation 155:22 156:3,7,8,9	spend 54:2 spent 13:2 30:7 160:6 sperry 2:3 6:17 spiese 158:17 spinosa 114:1,15 114:17 spite 70:6 spoken 19:12 27:7 145:10 spontaneous 153:5 spontaneously 153:2 spots 187:21 spread 121:10 spring 16:7 staff 11:25 12:10 49:18 50:11 53:8 61:7 63:6 151:11 169:14 170:2,11 stand 188:13 standard 57:20,20 62:20 76:11 122:10 136:22 151:24 standards 31:4,13 32:20 33:7,9 36:2 36:3,4,5,8 37:1,23 60:19 standing 48:9 106:23 standpoint 167:9 start 104:24 134:17 158:22 started 110:11 starting 8:20 110:9 180:19 starts 162:18 state 6:8,10 7:20 14:15,20 21:7,18 22:19 24:12,15	33:12,13,18,20,23 34:14 35:4 36:6 37:6 39:16 40:2 40:15 47:22 48:10 54:17 55:8,12,16 57:14 59:15 60:14 61:4 63:10,21 64:21,21,23 65:2,3 65:3,6,11 68:18 69:14 70:13 71:14 71:15,18,25 72:8,8 74:7,15 75:4 76:1 76:17 79:15,23 80:9 81:9,10 82:1 82:5,6 83:3 84:1 84:11 91:18 92:8 92:22,25 93:17,20 94:7 96:16 97:2,9 106:10,20 107:10 108:3 111:17 129:8 130:2,10 131:20,22 135:22 135:25 136:3 149:11 153:9,19 154:23 155:7,24 175:13,19 176:16 177:14,19,22 178:20 179:4,7,18 179:20,21,22 180:13,23,24 181:15 183:6,9,15 183:24 184:12,24 185:23 186:4,13 187:5,13,15,17 188:2,5 state's 33:16 37:9 95:10 179:25 stated 26:20 178:13 182:7 187:12	statement 40:4 42:21 43:20 58:1 88:23 90:8 91:3 91:11 101:6 112:9 113:12,18 114:11 124:10 148:13 161:15 statements 26:22 49:17,18 93:7 129:13 131:18,19 173:7 177:21 states 1:1 25:10 34:1,4,5 35:9,19 36:7,8,10,19 37:1 37:3 42:18 43:23 53:14 54:25 56:7 62:12,23 65:18 78:16 81:9 82:3 83:2 84:14 86:5 87:20 88:2,10 97:23 100:6 103:4 110:10 113:25 123:20 125:3 126:12 136:20 137:12 141:11,13 141:19 142:13 143:18 150:5,23 156:14 158:21 162:10 164:10,18 166:22 stating 95:4 status 31:17 87:3 statute 42:19,23 79:23 120:1 178:22 184:23 185:19 statutes 4:3 59:14 177:13 178:14 183:14 184:11 stay 45:2 106:8
--	--	--	--

[stayed - tackling]

Page 38

stayed 19:23 20:1 stenographic 190:6 step 50:23 51:3 72:7 steps 21:17 52:22 72:6 126:1,13 stick 118:17 stips 6:22 stipulated 5:2 stone 1:17 5:25 stopped 180:5 straight 115:8 strategies 34:5,6 street 2:3 strict 31:22 strike 55:18 57:15 84:19 100:4,16 135:23 146:23 181:12 string 4:14 stringent 33:17,19 34:8,11,16,18 35:9 35:18,20 71:14 strong 76:17 97:8 131:19 stronger 74:8,11 74:16 75:11 106:10 177:19 structure 91:10,11 struggling 62:21 students 9:21,24 study 150:10 155:10,17 style 68:4,5 subfactors 109:4 subject 22:11 32:19 33:4,21 39:11 59:18 64:16 90:20 91:13 100:18 102:12,23	135:13 subjected 103:9 subjective 116:5 subjects 62:12 submit 82:3,9 93:22 94:21,25 95:2,22 submittal 82:5 83:4 submitted 8:7 67:12 82:12,16 83:3,10 98:1 163:9 submitting 96:11 subparagraph 136:6,14 151:22 subpoena 28:17 subscribed 189:22 subsection 118:18 118:21 137:11,12 subsequent 139:14 subsequently 125:7 142:3 subsets 45:12 substance 21:2 22:18 24:1 36:18 38:16 68:13 139:11 169:20 substances 9:12 146:13 substantial 11:6,6 57:9 103:9 104:11 110:22 111:5 112:22 115:10 121:12 135:18 154:25 172:13,25 178:8,18 substantiality 11:11 substantially 73:4 111:7,11 119:9	120:19 substantive 22:8 85:11 147:18 successful 34:5 sufficient 105:24 113:19 sufficiently 34:13 85:18 suggest 51:24 52:3 66:19 75:8,9 104:18 112:25 140:20 143:1 155:22 179:5 suggested 167:19 suggesting 73:22 79:18,20 86:24 103:23 109:21 172:13 175:17 185:9,19 186:12 suggestion 80:7 93:10 suggests 57:11 87:2 115:7 156:11 165:7 suit 54:23 sulfur 173:25 sullivan 1:3 5:22 190:10 sum 21:2 24:1 36:17 summarize 29:6 122:15,19 152:11 summary 186:6 summer 16:7 supervisors 61:8 supplement 18:23 support 47:22 63:23 83:1 124:10 supporting 139:25 suppose 138:24 139:3 140:3 185:8	186:20 supposed 150:21 sure 12:3 17:17 30:19 42:5 49:19 50:1,12 64:4 65:14,24 75:6 78:3 80:12 106:24 118:12 120:3 125:1 134:6,17 150:20 153:5 159:13 170:10 171:1 172:11 174:6 surface 15:5 59:24 138:15,20 180:3 surprise 147:9 surprised 149:9 149:10 150:14 161:18 surrounding 145:2 surrounds 138:13 survey 126:4 surveys 125:18,23 suspension 164:11 swear 6:19 21:23 switch 127:4 switching 30:17 sworn 6:21 7:2 189:22 190:8 synonymous 52:4 system 24:4 30:19 101:8 178:2 systems 71:6 72:16 74:13
t			
t 3:8 4:1 5:1,1 190:1,1 table 7:13 tackling 14:23 71:13			

[tacks - time]

Page 39

tacks 135:19	technologies 32:21	185:17	theme 35:4 95:25
take 8:25 10:12	56:11 171:7,12	test 149:7 157:5	themselves 63:19
41:9 42:3,7 43:13	172:10,19 173:20	166:9 167:6,13,24	theory 157:5
50:17 60:17 63:18	174:4	168:1,15 170:16	thing 56:17 176:3
68:20 70:18 72:6	technology 33:9	175:6 182:4	things 35:22
77:25,25 84:18,20	171:19 172:1	testified 7:2 55:6	120:23 137:7
106:10 108:22,24	teed 151:12	66:24 67:4 73:3	161:20 169:10
113:15,17 122:12	teflon 10:3 89:23	75:12 97:11 113:4	181:24
123:11 124:20	164:11,22 167:23	180:22 181:22	think 17:24 18:24
125:3 136:8 158:4	168:13	184:1 186:2	19:18 20:9 22:4
159:14 161:23	tell 21:9 54:2	testify 29:3 64:12	27:4,7 34:12 40:7
162:6 174:14	temperature	175:22	40:11 47:21 59:23
176:24 177:19	127:6,13,16,20	testifying 29:1	66:12,17 85:15,17
taken 1:16 5:4,20	131:6 132:17,18	64:7	85:23 86:8,22
7:9,17,19,22 8:20	135:17	testimony 29:4	87:2 93:4 99:21
34:11,23 42:10	temperatures	55:10,12 59:9,21	105:19 113:11,17
45:20 74:8,16	128:9,12 131:14	62:13 63:3 64:17	114:11 116:7
78:6 97:7 110:16	ten 42:7 104:2	64:19 65:15 66:10	119:25 130:20
112:4,6 116:14	116:9 135:13	86:15,15 87:21	135:12 138:12
125:6 126:14	161:24 174:15	102:14 132:2	144:25 146:3,20
162:2 168:9,17	tend 34:5	178:3 181:16,25	154:5 156:7
174:20 189:4	tends 137:15	184:5 188:15	157:15 158:8,13
190:8	139:6 140:11	189:4,6	167:25 168:16
talk 44:18 80:11	tenure 173:13	testing 160:5	171:18,20 174:13
92:24 116:20	term 56:15 69:24	162:10,19,21	176:7,19
121:8,21 176:4	90:21,25 116:5	166:23 167:6	third 37:7 78:15
talked 185:11	125:16 160:8	171:3 175:24,24	84:13 87:20 103:4
talking 22:17	terminology 53:6	176:24 181:14	thorniness 11:11
64:11 104:20	terms 9:3 10:25	183:3	thorny 11:8
tangential 9:11	11:4 14:10 21:13	tests 149:19	thought 27:1,2
tanks 164:12	22:18 24:6 29:21	tetrafluoroethyle...	104:22 134:15
tantamount 48:8	46:21,23,24 52:4	164:11	threat 60:4
targeted 101:22	53:5 58:16 66:20	texas 7:19 8:14	three 2:9 97:22
targeting 142:9	68:22 74:12 85:12	71:25	98:18 134:11
tasked 182:18	91:9 92:7,9,18	thank 6:19,25	150:16 154:23
taught 9:11 40:9	97:16 103:20	37:14 41:21 78:3	tilgner 111:17,23
team 13:10	104:5,6 111:8	94:3 162:16	112:13,16
teams 44:14	127:2,20 128:23	174:24,25 176:2	tilgner's 112:20
technical 66:14	134:25 147:14	180:17	113:11
135:15 147:19	148:6 161:10	thanks 78:2	time 5:6 6:11 7:21
148:3	176:11 183:20		8:23 10:7,13,17

[time - turning]

Page 40

12:15,22 13:3,13 13:20,24 14:2,14 15:14 18:17 20:21 23:20 24:11,12 29:24 30:12 31:13 31:25 36:14 40:8 48:18,22 49:3 50:5 51:20 53:9 54:3,3,10 55:4 58:6 61:3 62:16 62:18 63:4,25 69:21 70:8 72:3 72:25 73:6,10,20 74:17,20 77:9 90:10 91:15 92:3 92:14 93:25 95:1 97:15,19 98:3 102:1,11,25 104:21 105:21,23 106:13 107:17 111:10 112:18 116:3 120:25 121:11,12,18 122:4 123:11 125:6,15 126:22 129:7,14 144:10 144:11 146:23 155:23 158:15 160:15 167:12 170:21 174:3,24 timeframes 81:25 timely 80:15 87:7 87:12 175:5 times 10:1 61:8 102:24 129:17 134:11 timing 104:9,25 107:1 title 78:16,22 79:2 81:7,25 83:1,2,20 84:24	titled 118:19 163:24 today 18:21 30:4 84:5 99:15 118:14 118:15 119:10 145:10 180:13 185:22 today's 29:1,15,19 145:15 188:15 told 22:1 168:2 toluene 134:2 top 13:10 15:16 25:8 26:25 28:19 34:10 69:11,12 88:2 93:6 98:8,11 108:2 116:22 117:18 140:4 141:16 159:17,20 164:18 165:12 topic 9:16 57:1 150:16 topics 30:17 127:4 tort 57:21,23 total 188:15 touch 20:1,18 touched 9:16 tour 99:13 tower 110:12 121:20 tower's 121:21 towers 90:9 97:18 98:2,9,16 103:12 104:2,6 105:1,9 107:2,19 108:14 111:5,14,23 town 10:4 toxic 9:12 14:8 59:25 139:4 141:11 143:21 144:10 146:13 173:25	toxicity 142:7,8 149:25 167:9 toxicologist 14:16 15:3,15 143:14 145:9 147:3 149:24 158:11 toxicologists 14:13 14:20 15:10 toxics 13:7,9 14:1 14:5,9,12,17,25,25 15:6 17:20 23:22 34:12,17 59:23 140:25 141:12,20 141:21 142:1,12 143:3 148:8 traced 184:2 trade 37:11 train 44:13 104:22 trained 76:17 trains 44:8 transcript 4:19 5:9 163:6 189:3 190:13,14,17 transcription 190:6 transferred 170:22 transition 41:25 77:24 translated 184:23 transmitting 89:10,21 treat 47:2,20 153:12 treated 179:1 treatment 71:6 72:16 74:13 101:8 129:10 130:5,12 130:20 185:24 treatments 70:11 70:11	trey 20:4 trial 5:6 29:3,4 tribunal 62:24 65:8 66:11 75:20 77:12 tricks 118:16 tried 67:18 105:16 166:24 trip 4:16 163:24 true 35:1 92:12 129:25 130:1 167:16 189:5 190:5 trust 174:16 try 72:2 76:5 121:7 122:8 134:17 147:12,24 trying 68:19,21,22 70:11,13 75:18 81:20 85:22 86:2 96:22 102:7 112:23 120:2 173:12 tuesday 121:19 turn 8:11 25:7 41:22 42:14 55:18 59:12 65:9,16 69:7 78:10 81:22 84:11 86:3 88:7 89:19 91:13 97:15 99:17 103:2 110:8 111:15 118:17 122:22 123:16 124:23 126:11 135:20 137:11 150:19 158:24 159:20 164:17 166:21 turning 16:14 37:14 53:13 87:18 107:17 111:9
--	--	---	--

[turning - vermont]

Page 41

136:13 141:16 153:17 159:6 two 21:1 23:24 24:23 32:24 78:12 81:12 87:21 88:14 88:14 91:9 101:13 107:19 108:24 110:7 111:15,22 120:23 121:22 131:7 150:16 154:20,23 157:7 157:18,23 type 72:9 135:15 types 70:10 78:12 87:21 88:14,15 102:20 110:20 142:8 153:16 161:2 typically 21:8 33:9 61:6 63:15 76:3 81:11 132:16 133:20	understand 17:12 30:19 36:23 41:13 50:12 51:7 52:8 54:5 65:9 70:12 80:13 132:2,21 134:6 145:6 156:15 161:20 168:10 understanding 43:9 53:5,24 55:2 64:6 81:5,8 103:22 105:25 120:3 127:8,12,18 127:25 128:1,14 129:11 130:13 131:15 137:6,20 142:14 144:14 145:19 149:18,22 154:9 173:19 188:1 understands 91:10 understood 72:15 111:23 126:18 134:15 unexplained 155:10 156:20 unfolding 17:22 unfortunately 69:16 unimpeded 12:3 union 150:6 unit 5:19 89:23 90:5,19 122:2 united 1:1 141:12 units 100:7,9,11 100:13 188:16 unresolved 46:10 47:17 untimely 79:19 84:6	unusual 63:12 unverified 48:10 update 21:8,11 updated 81:11 updating 19:3 upper 81:23 ups 180:18 use 33:9 37:4 43:17 56:15 62:21 70:15 71:2 76:3 100:21 129:21,24 134:20 163:14 173:14 174:4 182:15 useful 66:13 uses 91:8 usual 6:22 usually 63:18 utilize 56:10	vary 33:23 varying 10:22 15:3 vehicle 147:15 vehicles 35:23 37:5 verified 48:11 117:17 veritext 6:2,4 188:17 vermont 1:1,17 2:4 3:15 5:23 6:1 7:20 8:22 9:1,4 10:5,13,17 12:22 13:13,21 14:2,14 18:4 19:23 23:21 25:11 34:11,21 35:5,19 36:8,10,14 36:19 37:21 38:19 39:2 41:3,8 42:25 43:14 45:6 48:18 48:22 49:3 50:5 51:19 53:10 54:13 55:4,7 57:14 58:3 58:6 61:4 64:21 65:4,6 68:18 72:19 74:18 80:10 82:8,12,16 83:8,10 87:23 91:19,24 92:22 103:12,15 104:4,9 105:2,5,8 105:11,13 106:8 106:13,15 107:3 108:9,19,22 109:10 112:4 113:14,22 114:6 115:1,14,17 118:3 135:22,25 140:1 146:23 147:3 148:21 149:6,18 150:13,24 153:9
u	u 5:1 u.s. 5:23 7:21 ultimate 33:8 147:20 ultimately 130:11 146:10,15 147:20 169:9 177:11 um 159:25 unaware 67:2 174:11 uncertain 74:3 166:22 uncomfortable 176:4 181:22 underlying 29:25 110:18 undermines 109:7	v	v 1:6 78:16,22 79:3 81:7,25 83:1 83:2,20 84:24 123:19 190:11 v.1. 124:6 valentinetti 13:14 13:16 46:12 75:9 176:6 valintinetti 89:9 valuable 63:1 66:17 values 143:22 148:22 149:3,16 varied 81:8 variety 109:3 160:22 170:24 173:25 various 13:5 29:24 30:21 44:21 45:12 79:22 98:22 100:18 117:4

153:19 154:1,24 155:3 156:4 157:7 157:17 160:13 161:15 163:10,13 164:1 165:1,19,20 165:23 166:4,8 167:13,22,25 168:7,11 170:16 172:9 173:14 174:3,10 175:4,13 175:23 178:20 179:7 180:25 181:18 182:4 186:21,24 187:5 187:18 188:2 vermont's 13:7,20 34:7,14,18 35:8,17 36:1 39:5,12 41:19 42:19,22 43:10 44:21 79:11 79:12 83:2,14 138:3 142:15 143:15 176:25 178:8 179:10 versions 9:21 versus 45:24 70:2 video 1:12 5:20 videographer 1:20 5:14 6:3,18 42:8 42:11 78:4,7 116:12,15 161:25 162:3 174:18,21 188:11,13 view 64:16 77:15 84:23 91:2 viewpoint 77:1 violated 44:20 45:5 79:1 80:2 84:23 85:6,8 94:4 96:4 97:16 172:9 183:2 185:7,18	violation 47:5,8,14 47:14 48:8,13,17 49:9,15,23,25 52:20 59:7 75:17 76:22 79:6,13 85:3,15,19 86:25 96:19,22 97:13 103:8,20,22,25 104:10 105:3 107:4,10 108:25 109:2,3,6,7 111:5 111:8,12,25 113:20 114:3 115:4 117:11 121:15,24 123:25 128:22 172:16,20 172:22 173:1,4 178:8 179:4 184:9 184:20 185:1,5 violations 11:6,11 25:11 45:12 46:4 46:5,7,23,25 47:3 47:18,20,25 48:2 50:7 60:24 63:17 73:16,24 76:2,10 76:12,18,20 77:6,7 77:15 94:11 116:25 117:14 120:22 124:16 127:5 131:8,8 133:3 184:4 185:9 185:11,12,16 violator 74:1 75:24 109:1,1 virginia 54:6,22 virtue 97:6 154:14 vis 107:2,2 183:12 183:12 visible 48:23 49:1 49:2 100:25 101:14,17,20	102:16,17 122:23 123:1 124:4,7 129:16 visit 21:12 volatile 101:10 102:21 133:25 134:1 volumes 172:14 vose 158:10 vs 5:22 vtdigger 10:3 vulnerable 150:2 w w 56:5 wait 126:23 waived 5:8 112:17 waiver 111:21 113:1 walked 86:22 129:19 want 18:22,24 44:18 80:12 116:10 120:23 123:12 157:12 174:14 176:2 wanted 11:23,24 175:21 warn 150:20 warranted 11:12 104:11 washington 7:20 waste 24:18 39:18 59:24 147:16 158:17 179:25 180:1 181:4,5 186:15,18,18,21 188:7 water 8:14 13:3 15:4,5,5 18:13,18 39:18 59:24,24 138:16,20 139:2,7	139:23 140:23 144:18 146:14 147:16,17 148:19 160:5 161:22 164:10 180:3 way 1:17 5:25 9:11 24:17 37:6 45:2 52:1 64:22 76:8 77:1,4 81:20 113:3 122:5 124:12 125:15 130:1 131:23 133:6 139:4 150:18 157:13 163:16 167:16 173:10 174:11 185:13 ways 34:17 36:24 51:10 59:2 74:13 76:6 141:22 160:25 177:6 178:24 184:22 we've 23:3 35:11 37:15 52:22,24,24 61:11 84:13 86:22 95:20 116:20 158:8 159:11 184:21 website 4:10 141:9 wednesday 121:20 weigh 24:14,21 weight 50:25 72:2 weinraub 2:8 3:3 3:4 6:13,14,23 7:4 8:4 26:8,12 28:5,9 40:22 41:1,24 42:5,7,13 55:22 57:15 69:9 77:24 78:3,9 81:13,17 82:19,23 87:13,17 89:12,15 99:21
---	---	---	---

[weinraub - à]

Page 43

109:23 110:1 116:7,17 118:5,8 118:15 123:7,10 126:5,8 136:9,12 141:4,7 143:4,8 151:20 157:14,25 158:3 159:8,13,15 161:23 162:5 163:18,21 166:12 166:15 174:13,23 175:9 176:1 177:2 178:11 179:14,24 180:18,21 187:2 188:12 welcome 41:15 56:2 welfare 137:16 wells 160:6 178:5 went 136:1 west 54:6,22 wet 171:11,23 172:5 173:15 174:8 whatsoever 145:22 whispering 5:17 willingness 106:8 wished 171:2 witness 5:8 6:19 6:21 15:19 42:6 63:16 64:12 68:1 72:23 113:7 134:12 168:14 174:25 wonder 176:7 wool 2:3 6:17 word 51:24 62:22 65:24 124:9 156:25 182:15 worded 91:3	words 112:12 115:20 145:14 work 12:4 13:6 17:2,19 19:19 29:7,9,18 64:22 66:21 71:7,25 76:5 127:9,11 128:22 160:10 171:16 178:12 worked 13:4,9,10 15:10,12,15 18:8 24:18,20 37:5 52:16 65:6 145:12 160:25 161:6 working 17:19 23:22 61:10 70:2 70:9 71:1,5,22 72:16 118:3 147:22 178:23 works 30:19 130:2 158:17,18 171:19 172:1,3 178:12 world 81:20 157:6 174:8 worried 161:20 worse 111:11 worth 57:1 write 68:5,15 writers 130:3,10 writing 68:4,8,12 written 22:25 wrong 115:1 116:4 116:5 150:21 158:25 162:13	135:14 151:16 174:17 year 9:7 21:22 39:9 81:12 82:5 82:13 187:13,24 years 17:23 21:1,7 24:21 44:3 52:17 68:19 69:18 70:23 82:2 104:2 109:14 111:6,9 119:4 125:17 150:16 154:11,23 156:9 160:6 179:19 york 2:10,10 9:25 10:1 164:19 165:4 165:10,20,22 166:8 167:8,22 168:12 175:24 176:13 yup 103:11 134:13 151:18,21 158:15
		z
		zero 135:6
		à
		à 107:2 183:12
	x	
	x 3:1,8 4:1	
	y	
	yeah 17:13 33:1 35:15 67:2 89:3 97:21 100:5 120:2	

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2016. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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